



REPUBLIC OF KENYA



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**Kihagi v Yuchoka & 8 others (Environment & Land Case
923 of 2013) [2023] KEELC 20463 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 923 OF 2013**

MD MWANGI, J

OCTOBER 3, 2023

BETWEEN

BERNARD NGETHA KIHAGI PLAINTIFF

AND

BERNARD GATHUNGU YUCHOKA 1ST DEFENDANT

ELIZABETH SANYA NYONGESA 2ND DEFENDANT

EPHRAIM MWANIKI MURIUKI 3RD DEFENDANT

NAOMI WANJIRU MUNA 4TH DEFENDANT

FLORA MUMBI NGIRIGACHA 5TH DEFENDANT

JAMES GAKOBO KAMAU 6TH DEFENDANT

BENSON MUIRURI KARANJA 7TH DEFENDANT

JOSEPH NGIGI NDUNG'U 8TH DEFENDANT

ANTHONY MWANGI KARIUKI 9TH DEFENDANT

*(In respect of the Applicants's Application dated 8th June,
2023 seeking orderd for stay of execution pending appeal)*

RULING

Background

1. The Notice of Motion application dated 8th June, 2023 was filed under a certificate of urgency by the 3rd, 8th and 9th Defendants. The said application is brought under the provisions of Sections 1A, 1B, 3A, 80, 98 and 99 of the *Civil Procedure Act* & Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules. The Application seek orders: -



- a. Spent
 - b. Spent
 - c. Spent
 - d. That this Honourable Court be pleased to grant stay of execution of its judgement and decree dated the 2nd of May, 2023 pending the hearing and determination of the intended Appeal.
 - e. That the costs of this application be provided for.
2. The application is premised on the grounds on face of it and further supported by the Affidavit of Joseph Ngigi Ndungu deponed on the 8th June, 2023. The deponent deposes that in the Judgement delivered on the 2nd May, 2023, this Court ordered eviction of the 1st to 7th Defendants. The 1st to 7th Defendants were however granted 180 days only to vacate the suit properties in default whereof, they be evicted. These Applicants being dissatisfied with the said judgment have lodged an appeal to the Court of Appeal vide the Notice of Appeal dated 9th May, 2023.
3. The deponent states that in view of the intended appeal, they seek a stay of execution pending the hearing of the said appeal. The 1st to 7th Defendants risk being evicted upon the lapse of 180 days' grace period unless the stay is granted. Further that the appeal will be rendered nugatory if the orders sought are not granted. He deposes that they are ready to abide by any conditions that the court would set in granting the prayers sought.

Replying Affidavit

4. The Plaintiff, Benard Ngetha Kihagi opposed the application by way of the Replying Affidavit sworn on 5th July, 2023. He asserts that the application is not merited, is bad in law and should therefore not be allowed. He affirms that he is the registered proprietor of the suit premises after purchasing them from one Emily Wairimu Muhia sometime back in the year 2009. At the time of purchase, the suit properties were vacant. He has been unable to use his property for the past 12 years. It will therefore be unfair for the applicants to seek stay of execution that will cause him further delay in enjoying his land.
5. He avers that the application does not satisfy the grounds for issuance of an order for stay of pending appeal as the 8th Defendant who has sworn the Replying affidavit is not in occupation of the suit properties. The 8th Defendant has not explained what irreparable loss he stands to suffer in case eviction is actualized. Further, no authority to swear on behalf of the other Defendants has been exhibited by the 8th Defendant. The affidavits can only therefore be construed to be his.
6. It is only the 3rd, 8th and 9th Defendants who have filed the Notice of Appeal. There is no appeal by the 1st, 2nd, 4th, 5th, 6th and 7th Defendants; therefore, no stay of execution should be granted on their behalf.

Directions by the Court

7. Directions were given for the application to be disposed of by way of written submissions. Both parties complied with the directions.

Submissions by the Applicants

8. The Applicants identify two issues for determination. The first issue is whether the Applicants are likely to suffer substantial loss. They submit that the nature of orders issued in favour of the Plaintiff if executed upon the expiry of the stipulated 180 days, will occasion the applicants serious loss and harm.



The Plaintiff will be at liberty to evict the Applicants upon expiry of the 180 days. It is therefore just and fair to have the Applicants protected from being evicted pending the hearing and determination of the appeal.

9. The second issue is whether the appeal is likely to be rendered nugatory. The applicants submit that the appeal will be rendered nugatory as the substratum of the appeal will be lost.
10. The Applicants submit that they have moved this court without any delay and they are ready to abide by any conditions on security the court may prescribe in granting the orders sought. They have met the requirements of Order 42 rule 6 (2) of the Civil Procedure Rules, and their application should be allowed.

Plaintiff/ Respondent's submissions

11. The Plaintiff submits that the application is brought under wrong provisions of law. Order 45 of the Civil Procedure Rules deals with Review. The correct provision for any application for stay of execution is Order 42 of the Civil Procedure Rules.
12. The Plaintiff submits that the Applicants have not met the requirements under Order 42 Rule 6 of the Civil Procedure Rules. The 8th Defendant is not in occupation of the suit properties. The allegation that the 1st to 7th Defendants stand to suffer prejudice is not supported as the said Defendants have not authorised the 8th Defendant to swear the Replying Affidavit on their behalf.
13. He further submits that the application does not satisfy the conditions as set under Order 42 Rule 6 of the Civil Procedure Rules. The Applicants only seek to delay the Plaintiff from utilizing his land despite the 14 years wait. The application is not merited as the applicants have not demonstrated what irreparable loss they stand to suffer. They have also not offered any security as required by law. The application should therefore be dismissed with costs.

Issues for Determination

14. The only issue here is whether the Applicants have satisfied the principles for the grant of an order of stay of pending appeal.

Analysis and Determination

15. The law relating to stay pending Appeal is Order 42 Rule 6 (2). It is also important to state that the power to grant an order of stay is discretionary and is dependent on certain conditions being met.
16. Order 42 Rule 6(2) of the Civil Procedure Rules, 2010 provides as follows:-
 - (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.
17. In the case of Vishram Ravji Halai Vs. Thornton & Turpin Civil Application No. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending Appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction



of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

18. In *Butt Vs. Rent Restriction Tribunal* [1979], the Court of Appeal gave pointers on what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated thus:
 - i. The power of the court to grant or refuse an application for a stay of execution is a discretionary, and the discretion should be exercised in such a way as not to prevent an Appeal.
 - ii. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an Appeal may not be rendered nugatory should the Appeal court reverse the judge's discretion.
 - iii. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the Applicant at the end of the proceedings.
 - iv. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.
19. From the record of the trial and the averments in the Plaintiff/Respondent's replying affidavit, it is evident that the 8th and 9th Defendants are not in occupation of the suit premises. In as far as this Court is concerned, no substantial loss will be suffered by the 8th and the 9th Defendants/ Applicants. They cannot purport to seek the orders on behalf of the 1st, 2nd, 4th, 5th, 6th and 7th Defendants.
20. The Court of Appeal's decision in *Chris Munga N. Bichange vs Richard Nyagaka Tongi & 2 Others* eKLR stated the principles to be applied in considering an application for stay of execution as follows:

“... The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated ...”
21. In the case of *Mohamed Salim T/A Choice Butchery –vs- Nasserpuria Memon Jamat* (2013) eKLR, the court further stated that: -

“The right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right ...”
22. The Applicants in their submissions in response to the Plaintiff submit that the lack of a draft memorandum of appeal before this court cannot be the basis to ascertain whether the appeal will be rendered nugatory. How then is the Court supposed to tell or establish that their intended appeal has a reasonable chance of success without having had a chance to peruse the grounds of the intended appeal in a draft memorandum of appeal? The 3rd Defendant despite failing to attach a draft memorandum of appeal has not bothered to explain the grounds of his intended appeal on the body of the application or in the supporting affidavit. The court has no way therefore of establishing the basis of the intended appeal or its arguability. I therefore find no basis whatsoever for granting the orders sought for stay of execution pending appeal.



23. The upshot is that this Court finds no merit in the 3rd, 8th and 9th Defendant/Applicants' application dated 8th June, 2023. The application is dismissed with costs.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD DAY OF OCTOBER, 2023.

M. D MWANGI

JUDGE

In the virtual presence of:

Mr. Gachuhi for the Plaintiff/Respondent

Mr. Karwanda for the 3rd, 8th & 9th Defendants/Applicants

No appearance for the 1st, 2nd, 4th, 5th, 6th & 7th Defendants.

Yvette: Court Assistant

