



REPUBLIC OF KENYA



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**Nzioka v Ramu & another (Environment and Land Appeal  
E034 of 2022) [2023] KEELC 20368 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20368 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E034 OF 2022  
CA OCHIENG, J  
OCTOBER 4, 2023**

**BETWEEN**

**BERNARD NZIOKA ..... APPELLANT**

**AND**

**ALICE RAMU ..... 1<sup>ST</sup> RESPONDENT**

**NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES .... 2<sup>ND</sup>  
RESPONDENT**

**RULING**

1. What is before Court for determination is the Appellant's Notice of Motion Application dated the 3<sup>rd</sup> October, 2022 where he seeks the following Orders:
  1. Spent.
  2. That pending inter partes hearing of this Application, this Honourable Court be pleased to stay the execution of the Judgment and Decree dated 25<sup>th</sup> August, 2022 in Mavoko CMELC No. 73 of 2019 - Alice Ramu V NSSF Board of Trustees & Bernard Nzioka;
  3. That upon such inter partes hearing, this Honourable Court be pleased to stay execution of the Judgment and Decree dated 25<sup>th</sup> August, 2022, pending hearing and determination of the Applicant's Appeal that is, Machakos ELC Appeal No. E 034 of 2022 – Bernard Nzioka V Alice Ramu & NSSF Board of Trustees;
  4. That the costs of this Application be provided for.



2. The Application is based on the grounds on the face of it and the Supporting Affidavit of Bernard Nzioka where he confirms that Judgment was delivered on 25<sup>th</sup> August, 2022, in Mavoko CMELC No. 73 of 2019 - Alice Ramu Vs NSSF Board of Trustees & Bernard Nzioka, in favour of the 1<sup>st</sup> Respondent. He explains that he was granted thirty (30) days stay of execution which lapsed on 6<sup>th</sup> October, 2022. He avers that he was dissatisfied with the aforementioned Judgment and filed Machakos ELC Appeal No. E034 of 2022 Bernard Nzioka V Alice Ramu & NSSF Board of Trustees. He states that the impugned Judgment directed the 2<sup>nd</sup> Respondent to transfer LR No. 18064/30 hereinafter referred to as the suit property, to the 1<sup>st</sup> Respondent. He argues that should the suit property which is the subject matter in the Appeal, be transferred from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent, it will defeat his rights as well as render the Appeal nugatory. He contends that it is imperative to preserve the suit property by staying the execution of the trial court Judgment pending the Appeal. He reiterates that he has an arguable Appeal with high chances of success. Further, that neither the 1<sup>st</sup> nor 2<sup>nd</sup> Respondents will be prejudiced if the orders sought are granted.
3. The 1<sup>st</sup> Respondent opposed the instant Application and filed a Replying Affidavit sworn by Alice Ramu where she deposes that the said Application is fatally defective, incompetent, mala fides and an abuse of the court process. She insists that the trial Court in its Judgment of 25<sup>th</sup> August, 2022 issued a total of three orders and the Applicant has not specified which orders he wishes to stay. She contends that the Orders sought in the instant Application are vague and or not specific. She argues that the Orders granted in the Judgment of the trial court are negative in nature as it made a finding that the Plaintiff was the rightful owner of the suit property and therefore not capable of being stayed. She states that the Applicant has failed to demonstrate to court the irreparable harm he stands to suffer. Further, that the value of the suit property can be ascertained. She claims the instant Application is an attempt to deny her quiet possession of the suit property. Further, that the prayers to delay transfer of the suit property from the 2<sup>nd</sup> Respondent to herself has been overtaken by events.
4. The 2<sup>nd</sup> Respondent did not oppose the instant application.
5. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

6. Upon consideration of the instant Notice of Motion Application including the respective parties' Affidavits as well as rivalling submissions, the only issue for determination is whether there should be a stay of execution of the Judgment and Decree dated 25<sup>th</sup> August, 2022 in Mavoko CMELC No. 73 of 2019 - Alice Ramu V NSSF Board of Trustees & Bernard Nzioka, pending the final determination of the Appeal.
7. The Appellant in his submissions reiterates his averments as per the Supporting Affidavit and insists that the Appeal has high probability of success since it is not in dispute that he was allocated the suit property by the 2<sup>nd</sup> Respondent and he paid the full consideration to that effect. He explains that the dispute arose after survey when both the 1<sup>st</sup> Respondent and himself, claimed the same land. He insists he is the rightful owner of LR No. 18064/30 (suit property) and if the trial court Judgment is executed, the Appeal will be rendered nugatory. To support his averments, he relied on the following decisions: Nicholas Stephen Okaka & Another V Alfred Waga Wesonga (2022) eKLR which cited in approval James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012) eKLR; RWW v EKW (2019) eKLR as cited in Peter Nakupang Lowar V Nautu Lowar (2022) eKLR and Charles Kariuki Njuri V Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru - deceased (2020)) eKLR.



8. The 1<sup>st</sup> Respondent did not file written submissions but opted to rely on her Replying Affidavit.
9. The legal provisions governing stay of execution pending Appeal are contained in Order 42 Rule 6(2) of the *Civil Procedure Rules* which stipulates thus:

"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."

10. In the current scenario, Judgment was delivered on 25<sup>th</sup> August, 2022, in Mavoko CMELC No. 73 of 2019 - Alice Ramu Vs NSSF Board of Trustees & Bernard Nzioka, in favour of the 1<sup>st</sup> Respondent. Further, the trial Court proceeded to grant an order of permanent injunction restraining the 2<sup>nd</sup> Respondent and Appellant from the suit property; 2<sup>nd</sup> Respondent was compelled to transfer the suit property to the 1<sup>st</sup> Respondent and costs were awarded to the Appellant and 1<sup>st</sup> Respondent. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 21<sup>st</sup> September, 2022. The Appellant claims the trial Magistrate erred in entering Judgment and he stands to suffer irreparable harm if the suit property is transferred to the 1<sup>st</sup> Respondent. He contends that he stands to suffer substantial loss if the order of stay is not granted and the Appeal will be rendered nugatory. The 1<sup>st</sup> Respondent insists that the Appellant has not demonstrated the substantial loss he stands to suffer. The 2<sup>nd</sup> Respondent did not object to an order of stay of execution being granted pending Appeal.
11. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal while dealing with an Application for stay of execution pending Appeal held that a stay must be granted so that an Appeal may not be rendered nugatory and 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.
12. While in *James Wangalwa & Another Vs Agnes Naliaka Cheseto (2012)* eKLR it was held that:

"An Applicant must establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as a successful party."
13. From a perusal of the Judgment, it is not in dispute that both the Appellant and 1<sup>st</sup> Respondent paid for their respective parcels of land. Further, that it is the 2<sup>nd</sup> Respondent that allocated both the Appellant and 1<sup>st</sup> Respondent plots. The 1<sup>st</sup> Respondent claimed the suit property which the Appellant also sought. It is my considered view that the main issue in dispute is hence the location of each of the plots. It emerged in evidence that the 1<sup>st</sup> Respondent's initial plot was on a wayleave and she was hence allocated a second plot. Further, the 2<sup>nd</sup> Respondent's witness in her testimony admitted that when the plots in the suit land were allocated, they were using plan numbers and not actual plot numbers because at the time of allocation, the title numbers had not been issued. The trial court after considering the evidence presented proceeded to award the 1<sup>st</sup> Respondent the suit property.



14. Based on the facts before me while relying on the legal provisions I have cited as well as associating myself with the decisions quoted, I find that the Appellant has an arguable Appeal and I opine that if the suit property is transferred to the 1<sup>st</sup> Respondent, the Appellant indeed stands to suffer substantial loss. At this juncture, I find that execution of the lower court Judgment by transferring the suit property to the 1<sup>st</sup> Respondent will create a state of affairs that will irreparably affect or negate the very essential core of the Appeal and hence render it nugatory.
15. In the foregoing, I find that the Appellant has met the threshold set for granting stay of execution pending Appeal and will grant the orders as sought.
16. It is against the foregoing that I find the Appellants' Notice of Motion Application dated the 3<sup>rd</sup> October, 2022 merited and will allow it.
17. I will proceed to make the following final order:
  - a. That the execution of the trial Court's Judgment dated the 25<sup>th</sup> August, 2022 as well as consequential orders thereto be and are hereby stayed pending the hearing and determination of this Appeal.
  - b. Costs will abide the outcome of this Appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4<sup>TH</sup> DAY OF OCTOBER, 2023.**

**CHRISTINE OCHIENG**

**JUDGE**

