



Wangari v Ihururu Housing & Investment Co-operative Society & another (Environment and Land Appeal E03 of 2023) [2023] KEELC 21230 (KLR) (2 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21230 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E03 OF 2023
JO OLOLA, J
NOVEMBER 2, 2023**

BETWEEN

GRACE NYAMBURA WANGARI APPLICANT

AND

**IHURURU HOUSING & INVESTMENT CO-OPERATIVE SOCIETY 1ST
RESPONDENT**

MWALIMU AGENT 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 5th April 2022, Grace Nyambura Wangari (the Applicant) prays for a stay of execution of the Judgment of the Rent Restriction Tribunal delivered on 11th March, 2022 pending the hearing of her Appeal herein.
2. The application is supported by an Affidavit sworn by the Applicant and is premised on the grounds:
 - (i) That the Chairman of the Rent Restriction Tribunal delivered Judgment in favour of the Respondents and that the Applicant is aggrieved by the said Judgment and has lodged an Appeal;
 - (ii) That the Respondents have since moved to execute the said Judgment by issuing a demand of payment of expenses totaling Kshs 95,250/-.
 - (iii) That there is need to stay execution of the decree pending the hearing and determination of the substantive Appeal;
 - (iv) That it is in the wider interest of justice that the orders sought be granted;
 - (v) That the Respondent herein will suffer no prejudice; and
 - (vi) That the Appeal has high chances of success.



3. Ihururu Housing Investment Co-operative Society (the 1st Respondent) is opposed to the application. In a Replying Affidavit sworn on its behalf by its Vice-Secretary Michael Gachinga Kanone and filed herein on 27th February 2023, the 1st Respondent avers that the Applicant has brought this application prematurely and with intent to deny them the fruits of the Judgment delivered on 11th March, 2022.
4. The 1st Respondent asserts that this Court has the duty to prevent abuse of its process and to ensure that justice is appropriately administered. It is the 1st Respondent's case that it would be unfair for the Court to grant a stay of execution while there is a valid Judgment delivered by a competent Court of Law.
5. The 1st Respondent further asserts that the Appeal does not raise any triable issues as all the grounds of appeal have been countered by the evidence on record. The 1st Respondent avers that the Applicant has not demonstrated how she stands to suffer substantial loss if a stay of execution is not granted.
6. I have carefully perused and considered the application together with the response thereto. I have similarly perused and considered the submissions and authorities to which I was referred by the Learned Advocates representing the Parties herein.
7. By the application before the Court, the Applicant herein prays for a stay of execution of the orders issued by the th March, 2022 pending the hearing and disposal of the Appeal she has instituted herein. It is the Applicant's case that the Respondents have since moved to execute the Judgment of the Tribunal and that it is in the interest of justice that the stay be granted as her Appeal has high chances of success.
Rent Restriction Tribunal against herself on 11
8. Stay of execution pending an Appeal is a matter governed by Order 42 Rule 6 of the [Civil Procedure Rules, 2010](#), which provides as follows:
 - “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.
 - (2) 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.”
9. The power of a Court to grant an order of stay of execution is discretionary. This discretionary power must not be exercised whimsically or capriciously but must be exercised in a way that does not prevent



a Party from pursuing its Appeal so that the same is not rendered nugatory should the Appeal overturn the trial Court's decision (See *Butt v Rent Restriction Tribunal* (1979) eKLR).

10. As was stated by the Court of Appeal in *RWN v EKW* (2019) eKLR:

“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.”

11. As provided Order 42 Rule 6 (2) of the *Civil Procedure Rules*, an order of stay of execution ought not to be made unless the application is made without undue delay and the Court is satisfied that substantial loss may result to the applicant unless the order is made.

12. Considering what would amount to substantial loss in *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR, the Court observed as follows:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rules*. This is so because execution is a lawful process. The applicant must establish other 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 the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the *status quo* because such loss would render the appeal nugatory.”

13. In the matter before me, it was apparent that the Applicant had sued the two Respondents herein in Nyeri Rent Restriction Tribunal Case No 80 of 2020 seeking to bar them from evicting her from the premises she occupied or from harassing her and/or interfering with her peaceful occupation of the suit premises.

14. It was not in dispute that the suit premises known as Blue Valley Estate belonged to the 1st Respondent Co-operative Society. It was the Applicant's case that she had been appointed a caretaker of the said premises at a salary of Kshs 10,000/- per month. It was further her case that the 1st Respondent would pay her Kshs 5,000/- per month while the balance of Kshs 5,000/- was retained by the 1st Respondent as rent.

15. It was also apparent from the material placed before me that sometime in June 2020, the 1st Respondent appointed the 2nd Respondent – Mwalimu Agency Company Limited to manage the premises. The Applicant contends that the 2nd Respondent was appointed without any notice to herself and that she had done no mistake to warrant her replacement as such caretaker. She accuses the Respondents of subsequently failing to pay her the Kshs 5,000/- that was due as her rent for the next 18 months and that it was herself who ought to be paid the Kshs 90,000/- that was awarded by the Tribunal to the Respondents.



16. Considering the facts as above and while it may as well be that the Applicant may have a claim against the Respondents if she was indeed their employee, I was not persuaded that the execution of the orders of the Tribunal would occasion substantial loss to herself in the strict sense of the word.
17. Having herself admitted that she was a tenant in the suit premises, there was no basis upon which she could continue staying therein without paying rent once the 1st Respondent relieved her of her caretaker duties. It was also apparent that the decree from the Tribunal was a monetary decree. There was no averment on the part of the Applicant that the 1st Respondent who were the owners of the premises she had occupied would be unable to raise the Kshs 95,000/- that was awarded to them as per their counterclaim against the Applicant.
18. It follows that I was not persuaded that there was any merit in the Applicant's Motion dated 5th April, 2022. The same is dismissed with costs to the 1st Respondent.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 2ND DAY OF NOVEMBER, 2023.**

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J. O. OLOLA

JUDGE

_In the presence of:

Mr. Nyabende for the Appellant

Mr. Muchiri Wa Gathoni Holding Brief for Mrs. Wachira for the Respondent

Court Assistant - Kendi

