



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC ORIGINATING SUMMONS NO. 39 OF 2018**

**IN THE MATTER OF LAND PARCEL NYAKI/KITHOKA/1973 AND**

**SUBSEQUENT RESULTANT SUB-DIVISIONS NO.**

**NYAKI/KITHOKA/2573 AND 2574**

**REGISTERED IN THE NAME OF WILLIAM PETER MURIUNGI**

**BETWEEN**

**HENRY KATHIORA MURATHA.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**JULIUS BUNDI RIMBERE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**FLORENCE GACHERI MURIUNGI**

**(Sued as the administrator of the Estate**

**of William Peter Muriungi (Deceased).....DEFENDANT/APPLICANT**

**RULING**

1. After the court pronounced its judgment on 22.9.2021 in which it found the plaintiff entitled to 1.4 of an acre of each of **L.R No. Nyaki/Kithoka/2273** and ordered the registered owner, the defendant to execute the necessary documents to transfer the land thereof, the defendant felt aggrieved and has preferred an appeal.
2. By an application dated 30.11.2021, she now seeks for stay of execution of the aforesaid decree. The same is supported by her affidavit sworn on 30.11.2021.
3. The court directed the plaintiffs/respondents and the applicant to file responses and written submissions within 14 days respectively. The deadline to comply was fixed for 30.1.2022. None of the parties complied as ordered or at all. So the application largely remains unopposed.
4. Be that as it may, for a party seeking for a stay of execution under **Order 42 Rule 6 Civil Procedure Rules**, there are four key pillars to be met namely: substantial loss, no delay in filing the application, an offer for security and lastly that it is in the interest of justice to grant the orders sought.
5. Expounding on the principles, courts have held substantial loss must be over and above normal loss, which a losing litigant was expected to be exposed to. See **Kimaru J in Century Oil Trading Co. Ltd -vs- Kenya Shell Ltd [2008] eKLR, Karogo M'Nkoroi - vs- Nkirote M'Arai & another [2022] eKLR.**
6. Further, courts have held it is also not enough to state one is in occupation of the suit properties without any evidence of the material loss to be expected. See **Reuben Kinoti Kanake -vs- Eunice Karambu [2022] eKLR.**
7. Further, in granting the orders, it is a question of balancing the interest of the two rights. The right of a successful party to enjoy the fruits of his or her litigation as opposed to a constitutional right of appeal to the unsuccessful party. See **RWW -vs- EKW [2019] eKLR.**
8. Moreover, courts have held it was also a question of looking into what may happen to the substratum of the appeal if taken over by the

successful party and eventually the nature and character of the same disappears or is drastically changed to the detriment of the appellant in the event the appeal succeeds. See *James Wangalwa & Another –vs- Agnes Naliaka Chesoto [2012] eKLR.*

9. Further, a party seeking stay must offer sufficient security for the due satisfaction of the decree if the appeal were to be successful. See *Butt –vs- Rent Restriction Tribunal [1979] eKLR.*

10. It is therefore against the above parameters that this court shall proceed to establish if the applicant has met the threshold.

11. The applicant averred that she was apprehensive that the respondents were likely to execute the decree, which shall render the appeal nugatory and a mere academic exercise.

12. Further, she averred she stood to suffer immeasurably as the estate shall be deprived of the balance of the purchase price owed by the applicant who was alleged to be impecunious and hence unable to clear the balance.

13. Similarly, the applicant averred the respondent may transfer the premises to third parties rendering any judgment obtained in the appeal nugatory since recovery of the property may be difficult.

14. Again, the applicant has expressed willingness to abide by any reasonable terms as to security that may be imposed by court in the event stay was granted with conditions.

15. Lastly, the applicant stated she filed the application within reasonable time and that if the orders sought were granted, no prejudice was likely to be occasioned to the respondent.

16. As indicated above, the respondent was given adequate time to respond to the application but did not do so therefore it could not be said the right to fair hearing had been breached since an opportunity to do so was offered as held in *Kiai Mbaki & 2 others – vs- Gichuhi Macharia & another [2005] eKLR*

17. The applicant has stated that substantial loss was likely to be suffered was over the balance of the purchase price already conceded by the respondent and which she was apprehensive was unlikely to be paid since he was alleged to be impecunious. That allegation has not been denied by way of evidence on capacity to pay. The burden of rebutting that allegation once raised shifted to the respondents to satisfy the court he was capable of restitution as held in *National Industrial Credit Bank Ltd –vs- Aquinas Francis Wasike & another [2006] eKLR.*

18. The respondent has not discharged that burden by showing his financial strength. See *Robert Thurania Kaberia & Another –vs- Penina Muthoni [2021] eKLR.*

19. The judgment was delivered on 22.9.2021 and the application herein filed on 8.12.2021. My finding is the delay of two months or thereabout is not so inordinate to be termed as unreasonable.

20. In the circumstances, I find the application with merits. The same is allowed on condition that the applicant deposits the original title deeds for **L.R Nyaki/Kithoka/2273 and 2274** with the Deputy Registrar within 14 days from the date hereof failure of which the orders shall stand dismissed.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU THIS 2<sup>ND</sup> DAY OF MARCH, 2022**

**In presence of:**

Wafula for applicant – present

Mrs. Muia for respondents – present

Court Assistant – Kananu

**HON. C.K. NZILI**

**ELC JUDGE**