



**Ndana v Gitau (Environment and Land Appeal 86 of 2021)
[2022] KEELC 3572 (KLR) (5 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 86 OF 2021**

JG KEMEI, J

MAY 5, 2022

BETWEEN

EPHANTUS NDANA APPELLANT

AND

EUNICE WANJIRU GITAU RESPONDENT

RULING

1. The appellant/applicant filed the Notice of Motion application dated October 21, 2021 seeking orders that;
 - a. Spent.
 - b. Spent.
 - c. This honorable court be pleased to issue an order of stay of execution of the judgment and decree delivered on the October 14, 2021 and/or any further subsequent orders in ELC no 51 of 2020 in the SPM'S court at Ruiru pending the hearing and determination of this appeal.
 - d. Costs be in the cause.
2. The application is not premised on any legal provisions but is based on the grounds thereto and Supporting Affidavit of even date of Ephantus Ndana, the applicant. He deponed that being aggrieved by the trial court judgement delivered on the October 14, 2021 against him, he wishes to appeal and unless the above orders are granted, his appeal will be rendered nugatory. That the respondent has extracted the decree and will execute it anytime now. That the applicant has been in occupation of the land with his family for more than 10 years and has extensively developed it. That it is in the best interest of justice that the court allows his application.
3. The application is not opposed.



4. On November 18, 2021 directions were taken to canvass the application by way of written submissions. None of the parties had complied as at April 22, 2022.
5. The main issue for determination is whether the application is merited.
6. The legal provisions for stay of execution are anchored in order 42 rule 6 of the [Civil Procedure Rules](#) that;

“(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 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.”

7. It is trite that for an applicant to succeed in an application of this nature, one must establish 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. There is no doubt that this application was timely filed on October 21, 2021; 7 days after delivery of Judgment.
8. On establishment of sufficient cause, the applicant annexed copies of the impugned judgment and draft decree as EN1 and EN2 respectively. He has also filed his Memorandum of Appeal dated October 21, 2021 and in my view that limb is satisfied.
9. Has the applicant proven substantial loss that may result if such an order is not granted? At paras 4 and 5 of his S A, the applicant averred that he has been served by a draft decree signaling execution yet despite being in occupation of the suit land with his family for more than 10 years. That he has extensively developed the suit land and if the orders sought are not granted, he will suffer irreparable loss and damage. On the issue of substantial loss, Kuloba J (as he then was) captured it well in the case of [Machira t/a Machira & Company Advocates v East African Standard](#) (No 2) 2002 2 KLR as follows: -

“If the applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done



or in execution of an awarded decree or order before disposal of the applicant's business (e.g. appeal or intended appeal).”

10. The judge went on to add that: -

“Moreover, a court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended appellant of the means of prosecuting the appeal or intended appeal. So, really, stay is normally not granted, save in exceptional circumstances.”

11. Additionally Gikonyo J described it as follows in [*James Wangalwa & Another v. Agnes Naliaka Cheseto* \[2012\] eKLR:-](#)

“... the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss 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. That is what substantial loss would entail”

12. Other than swearing that the suit land has been his home for over 10 years, the applicant has not sufficiently demonstrated other factors that would negate his appeal if the respondent proceeds with execution of the trial court judgment issued in her favor. Execution as stated above is a lawful Court process. Further, the applicant did not offer any security for the appeal to exiate the respondent's right to enjoy the fruits of her judgment.

13. In the end, I find the application is unmerited. It is dismissed.

14. Costs shall be in the cause

15. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 5TH DAY OF MAY 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Bore holding brief for Nyasani for appellant/applicant

Mokaya for respondent

Court assistant - Phyllis

