



**Galechu & another v Komba (Environment and Land Appeal  
3 of 2021) [2022] KEELC 15599 (KLR) (4 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 15599 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI  
ENVIRONMENT AND LAND APPEAL 3 OF 2021**

**AK BOR, J**

**JULY 4, 2022**

**BETWEEN**

**WAKO GALECHU ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL MICHIRA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HADIJA ADAN KOMBA ..... RESPONDENT**

*(Being an application for stay of execution of the judgment delivered  
on November 23, 2021 in Nanyuki CMC ELC No 37 of 2018.)*

**RULING**

1. The appellants brought the application dated May 12, 2022 seeking stay of execution of the judgment delivered on November 23, 2021 in Nanyuki CMC ELC No 37 of 2018 pending the hearing and determination of their appeal. The application was brought under sections 3A, 75, 78, 79G of the [Civil Procedure Act](#) and order 42 rule 4 of the Civil Procedure Rules. The grounds on which the application is grounded are set out on the application and in the supporting affidavit of the 1<sup>st</sup> appellant sworn on May 12, 2022.
2. The Appellants contend that unless an order for stay of execution of the decree is made, substantial loss may result to them because they have built houses and other fixtures on the suit land and they claim that they would not be able to recover from the Respondent if their appeal succeeds. They urged that if execution of the decree is allowed to proceed, it would render their appeal nugatory. They added that they are unable to raise the sum of Kshs 1,000,000/= which was imposed as security by the trial court.
3. The Respondent's advocate swore the replying affidavit in opposition to that application. He deponed that the Appellants filed their appeal on December 21, 2021, just before the expiry of the period allowed by law to file an appeal. He averred that the Respondent extracted the decree on January 20, 2022 and pursuant to which an eviction order was issued on February 18, 2022. The executing auctioneer



sought an order for security during the eviction process from the trial court which was allowed vide the ruling delivered on March 8, 2022. That on the day the order was issued, the Appellants moved the trial court to set aside the ruling and also sought an order for stay of execution of the judgment through the application dated February 15, 2022 which was filed on March 3, 2022.

4. The Respondent's counsel averred that the application for stay of execution was made four months after the delivery of the judgment and in reaction to the service of the auctioneer's application for security. He averred that the trial magistrate considered both applications together and granted a stay of execution on April 12, 2022 subject to security in the sum of Kshs 1,000,000/= being deposited within 30 days. He deponed that the Appellants did not comply with the order to deposit security but instead brought the instant application five days after the expiry of the order made by the trial court directing them to deposit security without offering any explanation for the delay.
5. Parties filed written submissions which the court has considered. The Appellants contend in their submissions dated 10/6/2022 that they have lived on the suit land for forty years and have constructed houses and other structures on the land. They claimed that they have nowhere else to relocate to and that they will suffer substantial loss which will render their appeal nugatory. They relied on the case of *Charles Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of the Estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased))* [2020] eKLR where the court stated that the purpose of stay of execution is to preserve the substratum of the case.
6. The Appellants maintained that the application was filed in time considering the fact that being peasants, they had to take time to gather resources before they could instruct their lawyer which explains why the application was filed on May 17, 2022. Moreover, that they cannot raise the security of Kshs 1 Million ordered by the trial court and hence they urged the court to allow the application for stay of execution and direct them to deposit a security of Kshs 100,000/=. They relied on the decision in *Paul Kamura Kirunge v John Peter Nganga* [2019] eKLR in support of this contention.
7. The Respondent submitted that the Appellants have not demonstrated that their appeal will be rendered nugatory and that they will suffer substantial loss. She contended that the substance of the appeal is property rights and occupation of immovable property which can be restored in the event that the appeal is successful. The Respondent relied on the decisions in *Simon Wabome Wachichi v Iriaini Tea Factory and 2 others* [2016] eKLR and *Rocky Driving School Limited v Cute Kitchen Limited* [2015] KLR.
8. The Respondent submitted that the Appellants have a record of approaching the courts with very unreasonable delay which is never explained. She relied on *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR. Further, she contended that the Appellants have not given sufficient reason for the court to interfere with the discretion of the trial magistrate in arriving at the figure he did on the security to be furnished. Additionally, that the fact that the amount is unaffordable does not constitute a reason for this court to interfere with the security ordered by the Learned Magistrate.
9. The court has considered the application, response and the rival arguments of the parties. The issue for determination is whether the Appellants have satisfied the conditions for the grant of stay of execution provided under order 42 rule 6 of the *Civil Procedure Rules*. The background to this appeal is that the Respondent sued the Appellants for trespass on land reference number Nanyuki Municipality Block XI/382 and sought an eviction order against them. The Appellants denied trespassing upon the suit land and averred that it was their land which they referred to as unsurveyed plot number H Nanyuki Municipality. They also averred that the suit land was on a riparian zone therefore the Respondent cannot not be its rightful owner.



10. The Learned Principal Magistrate heard the case and, in his judgment, found that the Respondent had proved her case on a balance of probabilities and issued an eviction order allowing the Appellants to vacate the suit land voluntarily within 45 days.
11. In the application before this court, the Appellants contend that if execution proceeds, they will suffer substantial loss and their appeal will be rendered nugatory if their appeal succeeds because they have erected houses and other structures on the suit property and have nowhere else to go. The reason they gave for the delay in seeking stay of execution was that they needed to gather resources to instruct their lawyers. They have not complied with the order which the trial magistrate made regarding security because they claim that they cannot afford the security ordered by the court.
12. Looking at the court record, the conduct of the Appellants does not demonstrate the urgency of the situation they claim they are in. This is because they waited until 15/2/2022 before moving the court for orders of stay of execution of the judgment which was delivered on November 23, 2021. The memorandum of appeal is dated December 21, 2021. If they desired to stay execution of the decree, they could have made an application within the period of 45 days when they were ordered by the court to voluntarily vacate the suit land. They could also have made an oral application when the judgment was delivered.
13. The Appellants have not offered a satisfactory explanation for the delay in seeking stay of execution. Unexplained delay may be construed as unreasonable even a day after the delivery of a judgment especially when a time limit was given in the order, as is the case in this matter where the Appellants were given 45 days to vacate the suit land.
14. There was unreasonable delay on the part of the Appellants in moving the court for orders to stay execution of the decree. The Appellants failed to demonstrate that they stand to suffer substantial loss which would render their appeal nugatory if orders of stay are not granted. The court is not satisfied that it should vary the order requiring the Appellants to deposit security of Kshs 1,000,000/=.
15. The court notes that the proceedings in respect of the case before the trial court were typed and the file from the magistrates' court in respect of Nanyuki CMC ELC No 37 of 2018 forwarded to this court for purposes of the hearing of the appeal. It is not clear why the Appellants have not taken steps to file and serve the record of appeal so that the substantive appeal can be heard and determined expeditiously.
16. The court declines to grant the orders sought in the application dated May 12, 2022. The Appellants are directed to take steps to fast track the hearing of the appeal.

**DELIVERED VIRTUALLY AT NANYUKI THIS 4<sup>TH</sup> DAY OF JULY 2022.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Mwangi Kariuki for the Respondent

**Ms. Stella Gakii- Court Assistant**

No appearance for the Appellants

