



**Ng'ang'a v Bii & another (Environment & Land Case 388 of 2013)
[2022] KEELC 12806 (KLR) (4 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 12806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 388 OF 2013
FM NJOROGE, J
OCTOBER 4, 2022**

BETWEEN

MICHAEL MUNGAI NG'ANG'A PLAINTIFF

AND

PAUL KIPROTICH BII 1ST DEFENDANT

JOHN WACHIRA CHIRI 2ND DEFENDANT

RULING

The Application

1. This is a ruling in respect of the plaintiff's notice of motion application dated May 17, 2022. It has been brought under sections 3A, 53 and 66 of the *Civil Procedure Act*, order 42 rule 6(2) and order 51 rule 1 of the *Civil Procedure Rules, 2010* which seeks the following orders:
 - a. ...Spent
 - b. ...Spent
 - c. That there be a stay of execution herein pending the hearing and determination of the appeal.
 - d. That costs be in the cause
2. The application is supported by the grounds on the face of the application and the affidavit sworn by John Wachira Chiri on May 19, 2022. He deposes that the court delivered its judgment on March 30, 2022 in favor of the plaintiff; that being dissatisfied with the judgment, he preferred an appeal which appeal he believes is arguable with overwhelming chances of success; that unless stay is granted, the appeal shall be rendered nugatory and that he shall suffer irreparable damage.
3. In response to the application, the plaintiff Michael Mungai Ng'ang'a filed a replying affidavit sworn on June 21, 2022 and filed on the same date. He deposed that the judgment was delivered on March



30, 2022 and that there had been a long unexplained delay in the filed application; that the applicant did not show the loss he would suffer in the event the prayers sought are not granted; that as advised by his advocates which information he believes to be true the applicant did not offer any security for the due performance of the decree in the instant case and that it would thus be just and fair that the instant application be dismissed with costs.

Response

4. The application was to be canvassed by way of written submissions as directed by the court on June 22, 2022 but none of the parties filed their respective submissions.

Analysis and Determination

5. I would have exercised my discretion and dismissed the application for want of prosecution due to failure to file submissions but owing to the nature of the application being for stay, I will deal with it on the merits.
6. After considering the application and replying affidavit the only issue that arises for determination is whether the court should grant stay of execution pending appeal.
7. Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* 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.
8. In Civil Appeal No 107 of 2015, *Masisi Mwita v Damaris Wanjiku Njeri (2016) eKLR*, the court held that: -

“The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halai & Another v Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag JA) held that: -

“The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely; - sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.”



In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo Vs Straman EA Ltd (2013)* as follows:-

“In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other”

9. On whether the application was lodged expeditiously, the 2nd defendant/applicant filed the present application on May 23, 2022 while judgement in the matter was delivered on March 30, 2022. There is also a notice of appeal on the court record dated April 6, 2022 and lodged in court on April 7, 2022 it is therefore this court’s view that for the purposes of this application, there is an appeal in place and the present application was filed without unreasonable delay.
10. On whether the applicant will suffer substantial loss if the orders sought are not granted, the 2nd defendant/applicant only stated that unless stay is granted, the appeal would be rendered nugatory and he would suffer irreparable damage. He did not go further to justify or rather explain the loss. The plaintiff on the other hand stated that the applicant failed to show the loss he would suffer if the prayers sought are not granted. The applicant did not express himself to be willing to offer any security for costs.
11. In the upshot, this court finds that the application dated May 19, 2022 lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 4TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

