



**Wahome v Kurutu (Environment & Land Case E004 of 2022)
[2022] KEELC 13420 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE E004 OF 2022**

**YM ANGIMA, J
OCTOBER 6, 2022**

BETWEEN

FRANCIS NJURU WAHOME APPELLANT

AND

JOSEPH MUTURI KURUTU RESPONDENT

RULING

1. By a notice of motion dated March 14, 2022 grounded upon order 42 rule 6 of the *Civil Procedure Rules* (the rules), sections 1, 1A, 2, 3, & 3A of the *Civil Procedure Act* (cap.21), and all other enabling provisions of the law, the appellant sought a stay of execution of the judgment and decree of the trial court dated February 10, 2022 in Nyahururu CM ELC No 13 of 2019 together with all consequential orders pending the hearing and determination of the instant appeal. The appellant also sought a temporary injunction to restrain the respondent from entering, selling, transferring or interfering with the suit properties, that is, Nyandarua/Pesi/168 and 169 pending the hearing and determination of the appeal.
2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the appellant on March 14, 2022 and the exhibits thereto. The appellant contended that unless a stay of execution was granted the pending appeal might be rendered nugatory should it ultimately be successful. The appellant also contended that he might suffer substantial loss since he might be evicted from the suit properties unless a stay of execution was granted.
3. The respondent filed a replying affidavit sworn on April 26, 2022 in opposition to the application. The respondent contended that the application was incompetent, misconceived and an abuse of the court process. It was contended that the appellant had been unfairly in possession of the suit properties since 1995 which act was prejudicial to him. It was further contended that the appellant had not offered any reasonable security for due performance of the decree and that he had failed to demonstrate the



risk of substantial loss within the meaning of the law. The court was consequently urged to dismiss the application with costs.

4. When the application was listed for inter partes hearing, it was directed that it shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the appellant filed his submissions on May 30, 2022 whereas the respondent filed his on July 4, 2022.
5. The court has considered the appellant's application, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following two issues arise for determination herein:
 - a. Whether the appellant has made out a case for the grant of an order of stay of execution.
 - b. Whether the appellant has made out a case for the grant of a temporary injunction.
6. The court has considered the material and submissions on record on the first issue. There is no doubt that the appellant has been in possession of the suit properties prior to the entry of judgment by the trial court. The respondent has admitted in his replying affidavit that the appellant has been in possession since 1995 even though he contended that he had been in possession 'unfairly'.
7. The court is of the opinion that an application for stay of execution raises two competing interests in the administration of justice. On one hand, there is the right of the successful litigant to enjoy the fruits of his judgment. On the other hand, there is the right of the unsuccessful litigant to pursue his right of appeal without the outcome being rendered nugatory. The court has a duty of balancing these competing but legitimate interests.
8. In the case of *Butt vs- Rent Restriction Tribunal* [1979] eKLR it was held that although the power of a court to grant a stay pending appeal is discretionary, it should be exercised in such manner as to prevent a successful appeal from being rendered nugatory. It was further held that the court is required to take into account the particular circumstances of each case in granting or refusing a stay of execution.
9. The court is of the opinion that the appellant stands to suffer substantial loss if he were to be evicted from the suit properties during the pendency of his appeal. An eviction shall undoubtedly cause a substantial disruption of the appellant's socio-economic activities which may constitute substantial loss within the meaning of order 42 rule 6(2) of the rules. The court is thus inclined to grant the appellant a stay of execution of the decree upon certain conditions pending the hearing and determination of the pending appeal.
10. The court has also considered the material and submissions on record on the second issue. The appellant sought an interim injunction to restrain the respondent from entering, selling, transferring or interfering with the suit properties pending the pendency of the appeal. The appellant was apprehensive that the respondent might take over, sell, or transfer the suit properties during the pendency of the appeal thus rendering the outcome of the appeal nugatory. The court is of the opinion that once the decree of the trial court shall be stayed, there shall be no basis for the respondent to enter, repossess or interfere with the suit properties. There is, however, nothing preventing the respondent from selling or transferring the suit properties to third parties.
11. The court is of the opinion that it has a duty to preserve property which is in dispute pending the resolution thereof. The court is further of the opinion that unless the suit properties are preserved there would be a danger of the appeal being rendered nugatory should it be successful. However, the suit properties may be adequately preserved by granting an order of inhibition under section 69 of the



Land Registration Act, 2012 to prevent any dealings with them pending the hearing and determination of the appeal.

12. The upshot of the foregoing is that the court finds merit in the appellant's application for interim orders. Accordingly, the court makes the following orders for disposal of the notice of motion dated March 14, 2022:
- a. There shall be stay of execution of the judgment and decree of the trial court dated February 10, 2022 in Nyahururu CM ELC No 13 of 2019 for a period of 2 years from the date hereof or until the conclusion of the appeal, whichever comes first.
 - b. The appellant shall file and serve his record of appeal within 90 days from the date hereof and fix the appeal for directions.
 - c. An order of inhibition be and is hereby made to stop any dealings with Title Nos Nyandarua/ Pesi/168 & 169 for a period of 2 years from the date hereof or until conclusion of the appeal, whichever comes first.
 - d. The appellant shall deposit Kshs 200,000/= in court as security for due performance of the decree within 21 days from the date hereof.
 - e. In the event of the appellant defaulting on orders (b) and (d) above, the stay granted herein shall lapse automatically.

Orders accordingly.

RULING DATED AND SIGNED AT NYAHURURU THIS 6TH DAY OF OCTOBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

M/s Brenda Were for the Applicant

N/A for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

