



**Mwangi v Gakuya (Environment & Land Case 48 of 2019)  
[2022] KEELC 14512 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14512 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 48 OF 2019**

**JG KEMEI, J**

**NOVEMBER 3, 2022**

**BETWEEN**

**JAMES KAMANDE MWANGI ..... APPLICANT**

**AND**

**HARRISON MUHIA GAKUYA ..... DEFENDANT**

**RULING**

1. On 16/6/2022 this Court delivered Judgment and dismissed the Plaintiff's claim for adverse possession over parcel of land known as Kiambu/Municipality Block 5 (Kiamumbi)/ 528 (hereinafter the suit land). The dismissal of the suit immediately provoked two notice of Motions as follows;
  - a. Notice of Motion dated the 18/6/2022 filed by the Respondent/Defendant seeking orders inter alia of eviction of the Plaintiff from the suit land.
  - b. Notice of Motion dated the 29/6/2022 filed by the Plaintiff seeking stay of execution of the Judgement delivered on the 16/6/2022 pending the filing of an appeal in COACA/E91/2022.
2. On the 27/7/2022 parties elected to canvass the two Motions together hence this ruling.

**The Defendant's Notice of Motion dated 18/6/2022**

3. The Defendant filed the first Motion dated 18<sup>th</sup> June 2022 premised on Sections 1A, 1B and 3A *Civil Procedure Act*, Section 101 of the *Land Registration Act* and Sections 152B and 152E of the *Land Act* and all other enabling provisions of the law seeking to execute the said Judgment by seeking Orders That;
  - a. Spent.
  - b. This Honourable Court does grant an order for the eviction of the Applicant from the subject premises so as to avoid wastage and destruction of the property therein after the Judgment.



- c. The Officer Commanding Station Kiamumbi Police Station does provide security and assist in enforcing these orders.
  - d. The costs of the Application be provided for.
4. The application is premised on the grounds annexed thereto and the Supporting Affidavit of even date sworn by the Defendant, Harrison Muhia Gakuya. He deponed that he is the registered owner of the suit land since 2017 and the Plaintiff has been living thereon. That the Applicant's suit against the Respondent was dismissed and it is only fair and just that his Application be allowed as prayed. That he is apprehensive that following the dismissal of the Plaintiffs suit, the Plaintiff will begin destroying and or wasting the house and property, a situation that can be thwarted by the grant of the orders of eviction.
5. The Application was swiftly opposed vide the Plaintiff's Replying Affidavit sworn on 29/6/2022. He deponed that being dissatisfied with the Judgment herein against him, he intends to file an appeal at the Court of Appeal. That having resided on the premises for over two decades and in the event of eviction he and his family shall be rendered homeless as they have nowhere else to call home. That this will occasion him irreparable loss and damage. Maintaining that he has developed the suit land which is his residence and draws an income of Kshs. 50,000/- monthly from rental income. He denied any claims of destruction or wasting the suit land and expressed his intention to file an application for stay of execution.
6. The Application was prosecuted by way of written submissions which I have read and considered.
7. The Defendant acting in person filed his submissions dated 14/7/2022. He submitted that this Court delivered a Judgment in his favour and the Plaintiff has not tendered any evidence to show that he has instituted an appeal as claimed; no evidence of the alleged loss and or income has been shown contrary to the Plaintiffs allegations contained in the Replying Affidavit. That his right to own property is protected under Article 40 Constitution and that he is entitled to enjoy the fruits of his Judgment. He reiterated that there must be an end to litigation and urged the Court to allow his application as prayed.
8. The firm of Kimani Kahete & Co. Advocates filed the undated submissions on behalf of the Plaintiff on 22/7/2022. He reiterated the contents of the Application and his Replying Affidavit and pointed out that he has since filed an application dated 29/6/2022 seeking stay of execution of the impugned Judgment and that the said application is pending determination by this Honourable Court. He urged the Court exercise its discretion and decline the prayers for eviction as they would inflict great hardship on the Plaintiff who he submits is in possession and occupation of the suit land.

#### **The Plaintiff's Notice of Motion dated 29/6/2022**

9. Vide this Motion premised on Order 22 rule 22, Order 51 rules 1 and 13(2) *Civil Procedure Rules* and Sections 1A, 1B & 3A *Civil Procedure Act*, the Plaintiff filed a notice of Motion dated the 29/6/2022 seeking the following prayers;
  - a. Spent.
  - b. There be a stay of execution of the Judgment delivered on June 16, 2022 pending the filing of an appeal at the Court of appeal in COACA/E391/2022 (sic).
  - c. Costs of this Application be awarded to the Defendant/Respondent.
10. The Application is premised on the grounds annexed and the Supporting Affidavit of even date sworn of the Plaintiff, James Kamande Mwangi. He swore that being aggrieved by the Judgment of this



Court delivered on the 16/6/2022 he has lodged his appeal at the Court of Appeal as exhibited by JKM2 – copy of Notice of Appeal. That the right of appeal is a constitutional right and unless the application of stay of execution is granted he has reasonable apprehension that the Defendant will proceed to evict him hence occasioning him substantial loss and damage including rendering him and his family homeless. That no prejudice shall be suffered by the Defendant if stay of execution is granted and that it is in the interest of justice that he is given a chance to be heard on appeal.

11. The Defendant opposed the Motion vide his Replying Affidavit sworn on 26/7/2022 and 3/8/2022. He averred that the application is fatally defective as there is no appeal filed yet. He denied that the Plaintiff would suffer any substantial loss as claimed because the Plaintiff has two homes in Gatanga and Nanyuki. He beseeched the Court to dismiss the application and grant him eviction orders as sought in his application. That the Plaintiff has unjustifiably not paid him rent amounting to Kshs. 215,000/- for 3 years and 7 months yet he remains in occupation of the suit land.
12. In a rejoinder, the Plaintiff filed a further Affidavit sworn on 15/8/2022. He maintained that he has filed his Notice of Appeal in this Court and lodged it in the appellate Court. That he does not owe the Defendant any arrears as averred and instead it's the Defendant who owes him the costs of putting up the structures in the suit land and that in any event the Defendant has not lived on the suit land for over two decades and therefore does not stand to suffer any prejudice if the orders of stay of execution are granted. He denied any other homes other than the suit land. Urged the Court to allow his application so that his appeal is not rendered nugatory.
13. Similarly, the instant Application was canvassed by way of written submissions.
14. The Plaintiff filed his submissions dated 26/8/2022 through his Counsel, Kimani Kahete & Co. Advocates. The provision for stay of execution under Order 42 Rule 6(2) *Civil Procedure Rules* were recited in support of the application.
15. Relying on the case of *RMW Vs EKW* (2019) eKLR, the Plaintiff stated that the purpose of stay of execution is as follows;

“The purpose of an application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory. However in doing so the Court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her Judgment. The Court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
16. The Plaintiff also relied on the case of *James Wangalwa & Anor. V Agnes Naliaka Cheseto* [2012] eKLR in which the Court appreciated that execution is a lawful process which in itself does not amount to substantial loss. That the Application was filed timeously and ought to be allowed to preserve the suit land and status quo pending the determination of the appeal.
17. The Defendant filed his submissions dated 19/9/2022. He highlighted the provisions on Order 42 rule 6 of the case of *Elena D Korir vs Kenyatta University* (2013) eKLR where the Court stated that the Courts power to grant stay of execution is fettered by three conditions namely; sufficient cause, substantial loss that would ensue from the refusal to grant stay, the Applicant must furnish security and the application must be made without unreasonable delay and that in addition the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted.
18. In addition the Defendant relied on the cases of *Hassan Guyo Wakalo vs Straman EA Ltd* (2013) eKLR and *Hassan Guyo Wakalo vs Straan FA Ltd* (2013) and *James Wangalwa & Anor vs Agnes Naliaka*



Cheseto (2012) to support the proposition that the Plaintiff is yet to establish the loss that he will suffer as he is yet to file an appeal against the Judgement and also that he has declined to pay rent despite residing on the suit land.

### **Analysis and determination**

19. Given the nature of the application, I shall determine them in this order firstly the application for stay of execution and if it fails then I embark on the one seeking eviction and should the application succeed then the later shall have been rendered moot.
20. The relevant legal provision for stay of execution is entrenched in Order 42 Rule 6(2) *Civil Procedure Rules* that;
  - “(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.”
21. In the case of Butt vs. Rent Restriction Tribunal (1982) KLR 417 the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal namely; -
  - a. The power of the Court to grant or refuse an Application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  - b. The general principal in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the judge’s discretion.
  - c. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the Applicant at the end of the proceedings.
  - d. The Court in exercising its discretion whether to grant or refuse an Application for stay will consider the special circumstances of the case and its unique requirements.
22. In determining an application for grant of orders of stay of execution, the Court is being called upon to establish whether the application was made timeously, the Applicant has established substantial loss that is likely to be suffered should the application be denied and whether security for the due performance of the Decree has been adequately been provided.
23. In the case of Visbham Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365, it was held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under Order 41 Rule 6 of the *Civil Procedure Rules* (then) is fettered by 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.
26. In this case Judgment was delivered on the 16/6/2022 and the Plaintiff filed his application for stay on the 29/6/2022, about 13 days after and therefore timeously.



27. The second requirement that the Court is being called upon to inquire is whether the Applicant has demonstrated the substantial loss that he stands to suffer if the application is denied. In the case of *Machira T/A Machira & Company Advocates - vs- East African Standard* (No 2) 2002 2 KLR the Court held that substantial loss must be specified, details or particulars 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.
28. In this case it is not in dispute that the Plaintiff is in occupation of the suit land and hence the Defendant's prayer for eviction. That Plaintiff has argued that he has filed an appeal which appeal has a high chance of success given that it has arguable issues for the determination of the appellate Court. That if stay of execution is denied he stands to suffer loss and damage and his appeal shall be rendered nugatory. It is to be observed that the Plaintiff has duly filed the appeal as shown on record and the Court noting that there is no overwhelming hindrance and in order to allow him ventilate the same and balancing the rights of the victorious party in the Judgement to be left alone to enjoy the fruits of the Judgement and the duty of this Court to uphold the right of the loser to be heard on appeal, this Court is of the view that the Plaintiff has demonstrated substantial loss and is deserving of the orders.
29. With respect to the provision of the security for the due performance of the Decree, it is trite that this falls within the unfettered power of the Court to so decide despite the Plaintiff having failed to offer the same.
30. The Court having granted the application for stay of execution, the Defendants application for eviction is now rendered moot.
31. The application is merited. It is granted on the following terms;
  - a. The Applicant to deposit Kshs 100,000/- being security for the due performance of the Decree in a joint interest account in the names of the Advocate of the Plaintiff and the name of the Defendant within a period of 30 days from the date hereof.
  - b. In default the application shall stand dismissed with no further orders from this Court.

Orders accordingly

**DELIVERED, DATED AND SIGNED AT THIKA THIS 3RD DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Ms Thuo HB Kimani for Plaintiff

Defendant – Present in person

Court Assistants – Phyllis Mwangi / Oliver

