



**Wahome v Maina (Environment and Land Appeal E015 of 2022)
[2022] KEELC 14515 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E015 OF 2022**

JO OLOLA, J

NOVEMBER 3, 2022

BETWEEN

JORAM WAMBUGU WAHOME APPLICANT

AND

PAUL MURIUKI MAINA RESPONDENT

RULING

1. By the notice of motion dated May 27, 2022 as filed herein on May 31, 2022 Joram Wambugu Wahome (the appellant) prays for orders:
 2. That this honourable court be pleased to grant leave to the firm of M/S Karanja Maina & Company Advocates to come on record for the plaintiff in place of Mshila Shuma & Company Advocates after ruling/orders herein dated May 9, 2022 have been passed;
 4. That there be a stay of execution of the ruling/orders issued in Nyeri Chief Magistrate's Court in ELC No 84 of 2019 on May 9, 2022 and any consequential orders therein pending the hearing and final determination of the intended appeal herein lodged; and
 5. That the costs of this application abide the outcome of the intended appeal.
2. The application is supported by an affidavit sworn by the appellant on May 27, 2022 and a supplementary one sworn on July 6, 2022 and is premised on the grounds that:
 - (a) A ruling has been entered in the said case against the appellant herein;
 - (b) The appellant has instructed M/S Karanja Maina & Company Advocates to act for himself in place of M/S Mshila Shuma & Company Advocates;
 - (c) The new firm requires leave to come on record for the appellant post the ruling;



- (d) The appellant has lodged an appeal to this court against the ruling/orders issued on May 9, 2022 which appeal has high chances of success;
 - (f) The appeal will be rendered nugatory if the ruling/orders are not stayed;
 - (g) The appellants stands to suffer substantial loss, damage, prejudice and injustice if the orders are not granted as his family shall be evicted from the suit land;
 - (h) The appellant is ready to abide by any conditions the court so orders in granting the orders sought;
 - (i) The respondent will suffer no prejudice if the said orders are granted;
 - (j) It is in the interest of justice that this application is allowed and the orders prayed granted;
 - (k) This application has been made without any delay whatsoever.
3. Paul Muriuki Maina (the respondent) is opposed to the grant of the orders sought. In his replying affidavit sworn and filed herein on June 20, 2022, the respondent avers that the appellant had by the suit filed in the subordinate court sought a declaration to be made that the transfer of Plot No Nyeri/ Municipality Block 1/1577 which had been sold and transferred to the respondent by the appellant's wife be declared null and void.
 4. The respondent avers that the appellant's wife who was sued as the 1st defendant in the said case with himself as the 2nd defendants filed their respective defences in the said case and testified at the trial justifying the transaction. Upon hearing the case the court dismissed the appellant's claim and ordered him to vacate the suit premises within 30 days and in default he be evicted.
 5. The respondent further avers that before the court rendered the judgment, it had on February 27, 2020 ordered that the rents that were paid by the tenants who occupy the premises would continue to be remitted to the respondent's agent. The respondent avers that the appellant defied the court order and continued to collect the rent which was Kshs 75,000/- every month.
 6. The respondent avers that the appellant thereafter applied for stay of execution of the judgment pending appeal and that the appellant told the court he was ready to abide by any condition that the court may set as security for stay. The court accepted the application and allowed it on condition that the appellant provides security of Kshs 3.5 Million and that the rental income from June, 2022 be collected by one James Gichuhi Ndung'u of Urban Premier Property Limited to be deposited in a joint interest earning account.
 7. The respondent further asserts that the court correctly exercised its discretion on the matter as requested by both parties and that the appellant's further application for stay should be declined.
 8. I have carefully perused and considered the application as well as the response thereto.
 9. The appellant herein urges the court to grant leave to his new advocates to come on record and in the main, to stay execution of the orders issued in Nyeri Chief Magistrates' Court ELC Case No 84 of 2019 on May 9, 2022 requiring him to inter alia deposit a sum of Kshs 3.5 Million as security for the due performance of the decree.
 10. I did not hear the respondent to object to the appellant's prayer for leave to be granted to M/S Karanja Maina & Company Advocates to come on record as the new counsels for the appellant. What was contested was whether this court should issue an order of stay of execution of the lower court's orders issued on May 9, 2022 aforesaid.



11. From the material placed before me, the appellant herein was the plaintiff in Nyeri Chief Magistrates' ELC Case No 84 of 2019. In the said suit, the appellant sought a declaratory order that the transfer of land parcel number Nyeri Municipality Block 1/1577 by his wife Lucy Nduta Kamau who was the 1st defendant in the said case to the respondent herein was null and void. The appellant also sought an order that the Nyeri County Land Registrar be ordered to cancel the certificate of lease issued to the respondent on October 24, 2019 and that the suit property be registered in the joint names of his wife and himself.
12. In a judgment delivered on June 28, 2021, the court dismissed the appellant's suit and allowed the respondent's counter claim which sought the eviction of the appellant from the suit premises. Accordingly the trial court gave the appellant 30 days within which to vacate the suit premises failure to which the respondent would evict him at his own costs.
13. Aggrieved by the said determination, the appellant filed before the subordinate court an application dated September 3, 2021 seeking orders of stay of execution of that judgment pending an appeal to this court. In a ruling delivered on May 9, 2022, the Honourable Francis Andayi, Chief Magistrate allowed the application on the terms stated in the ruling as follows:
 - (a) The applicant shall keep the suit property in the manner in which (it is) as of this date without any subtraction or addition in any way without the court's order. In other words, the applicant shall not carry out or cause or permit to be carried out any form of development or human wastage of the property;
 - (b) Secondly, the applicant shall within thirty (30) days from today provide security for the due performance of any decree against him in this matter in the sum of Kshs 3.5 million by depositing the money in a joint interest earning account to be opened for that purpose in the names of the advocates for the parties;
 - (c) Thirdly, from the month of June, 2022 all rent from the suit premises shall be collected by James Gichuki Ndung'u of Urban Premier Property Limited and deposited into the said joint interest earning account less his reasonable charges for the same which shall be deducted after every three months; and
 - (d) Failure to abide by any of these conditions, the order of stay shall lapse.'
14. Once again aggrieved by the said ruling, the appellant lodged the present appeal together with this present application. It is the appellant's case that unless the said orders are stayed he stands to suffer substantial loss, damage, prejudice and injustice as his family may be evicted from the suit premises.
15. The rationale for an order for security for costs was discussed in *Gatirau Peter Munya -vs- Dickson Mwenda Kitbinji & 2 Others (2014) eKLR* where the court observed as follows:

' The test in an application for security for costs is not whether the plaintiff has established a prima facie case but whether the defendant has shown a bona fide defence.'
16. Discussing the same issue in *Jayesh Hasmukh Shah -vs- Narin Haira & Another (2015) eKLR*, the court held thus:

' It is now settled law the order for security for costs is a discretionary one as long as that discretion is exercised reasonably, and having regard to the circumstance of each case. Such factors as absence of known assets in the country, absence of an office within the jurisdiction of the court, inability to pay costs, the general financial standing or wellness of the plaintiff,



the bona fides of the plaintiff's claim, or any other relevant circumstance or conduct of the plaintiff or defendant may be taken into account.'

17. As it were, an order for security of costs is meant to ensure that the respondent is not left without recompense for any costs or charges payable to him. The duty of the court is therefore to create a level playing ground for all the parties involved. The court must therefore weigh the proportionality of the right of the appellant herein to access justice vis-à-vis that of the respondent to have security for any costs that may be owed to him and not to have vexatious proceedings brought against him.
18. In the matter before me, it is apparent that the sum of Kshs 3.5 million was proposed as security for costs by the respondent and the court adopted the sum on the basis that the same had not been contested by the appellant. I was not however persuaded that there was any proper basis to require the appellant to deposit such a huge sum of money as security in the circumstances herein.
19. While an order for security for costs is indeed discretionary, such discretion ought to be exercised reasonably and in a manner that does not appear to hinder a party's reasonable access to justice.
20. In the circumstances herein I am persuaded that there is some merit in the motion dated May 27, 2022. I did not however think the requirement for security for costs was entirely without basis. Accordingly the application succeeds partially and I hereby vary the orders issued in Nyeri Chief Magistrates' Environment and Land Court Case No 84 of 2019 on May 9, 2022 with a requirement that the appellant deposits the sum of Kshs 500,000/- as security for costs within 30 days from today. I did not find any basis for the stay of the rest of the orders issued by the court.
21. The costs of this application shall be in the appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 3RD NOVEMBER, 2022.

In the presence of:

Mr. Karanja for the Applicant

Mr. S. K. Njuguna for the Respondent

Court assistant - Kendi

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J. O. Olola

JUDGE

