



REPUBLIC OF KENYA



**Waganagwa v Ngugi (Civil Appeal 044 of 2023)
[2024] KEHC 470 (KLR) (17 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 470 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL 044 OF 2023
SN MUTUKU, J
JANUARY 17, 2024**

BETWEEN

PATRICK NJIRU WAGANAGWA APPELLANT

AND

CATHERINE NJERI NGUGI RESPONDENT

RULING

1. The Appellant herein has moved this court by way of Notice of Motion dated 7th August 2023 brought under various provisions of the law seeking the following orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this Application this Honourable Court be pleased to order stay of execution of the decree from the judgment of Hon. B. Cheloti, R. M Kajiado delivered on 17th November 2022 in Civil Case No. 131 of 2020.
 - iii. That pending hearing and determination fo this Application the Respondent, her agents, auctioneers or any person acting on her behalf be restrained from attaching, selling, advertising for sale or dealing in any manner whatsoever with the Appellant's/Applicant's properties.
 - iv. That pending hearing and determination fo this Application the Respondent, her agents, auctioneers or any person acting on her behalf be restrained from attaching, selling, advertising for sale, arresting or dealing in any manner whatsoever with the Appellant and her properties.
 - v. That costs be provided for.
2. The grounds in support of the application are found on the face of it and in the supporting affidavit sworn by the Applicant on 7th August 2023 to the effect that the Applicant is dissatisfied with the judgment of the lower court delivered on 17th November 2022 and has preferred to file this appeal; that he received the said judgment on 15th January 2023 after being served with the proclamation; that



he his appeal has overwhelming chances of success; that he is apprehensive that his properties may be attached and sold in execution.

3. The application is opposed through a Replying Affidavit sworn by the Respondent on 18th August 2023 in which he has deposed that she filed case number 131 of 2020 claiming against the Applicant Kshs 3,200,000 being the balance of the purchase price for land she had sold to him; that the matter proceeded to conclusion and that the Applicant, and his advocate were at all times aware of the hearing dates.
4. She has deposed that the Applicant has not sufficient cause or that he has an arguable appeal as envisaged under Order 42 Rule 6 of the *Civil Procedure Rules*; that the Applicant has not proved that he will any substantial loss since he is in possession of the land which he bought from the Respondent and that he has not provided security for the due performance of the decree and therefore granting stay of execution will leave the Respondent exposed. It is deposed that the Applicant has not shown good reasons to enable this court to grant him the prayers he is seeking. The Respondent urged that this application be dismissed.

Submissions

5. This court directed that the application be canvassed through written submissions. The Applicant filed his submissions dated 23rd October 2023. He submitted on two issues: whether the Applicant has met the threshold to warrant a stay of execution and who is to pay costs of this application.
6. On the first issue, it is submitted that his appeal will be rendered nugatory and that he will be exposed to irreparable loss should execution proceed; that his appeal is arguable and has high chances of success. He relied on *Peter Ondande t/a Spreawett Chemis v Josephine Wangari Karanja [2006]* eKLR where it was held that:

“The issue for determination by this court is whether the applicant has established a case to enable this court grant him stay of execution sought. For this court to grant stay of execution, it must be satisfied that substantial loss may result to the applicant if stay is not granted. Further, the applicant must have filed the application for stay of execution without unreasonable delay. Finally, the applicant must provide such security as may ultimately be binding upon him.”
7. He also relied on *Focin Motorcycle Co. Limited v Ann Wambui Wangui & another [2018]* eKLR and submitted that he is at the risk of suffering irreversible damage if the decree of the lower court is not stayed as the Respondent has not produced evidence of means to demonstrate that she can compensate the applicant in the event the appeal succeeds.
8. On the issue of costs, it is submitted that costs follow the event unless the court otherwise orders. He cited section 27 of the *Civil Procedure Act* and the case of *Cecilia Karuru Ngayu v Barclays Bank of Kenya & another [2016]* eKLR to emphasize the point that costs follow the event and that ‘event’ means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising from different causes of actions or under one cause of action, the costs of any particular issue goes to the party who succeeds upon it.
9. In brief, the Respondent is asking this court to award costs to her.



Determination

10. I have considered the application and the grounds in support of it. I have considered the grounds opposing the application and submissions of parties. Order 42 Rule 6 (1) & (2) provide that:

- (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.

11. The Applicant has argued that he was not given a chance to defend his case and that the Plaint was defective. He has argued that he will suffer damage because the Respondent has not demonstrated that she can pay him should the appeal succeed. On the other hand, the Respondent claims that the Applicant has not provided security for the due performance of the decree. I have not had the opportunity to read the record of the lower court and I am not able to determine the veracity of the argument that the Plaint was defective.

12. I will give the Applicant the benefit of doubt and allow his application on the grounds he has advanced. However, he must provide security as the law states. I have noted that he is silent on the issue of security. Consequently, the Notice of Motion dated 7th August 2023 is hereby allowed in the following terms:

- i. That stay of execution of the judgment and decree of the lower court in CMCC No. 131 of 2020 is hereby granted pending the hearing and determination of the appeal.
- ii. That the Applicant shall deposit the decretal sum, in a joint interest earning account held in both names of the advocates for the Applicant and the Respondent currently on record, within 45 days of today’s date. Failure to comply with this order will result in automatic lapse of the order for stay of execution.
- iii. The Applicant shall prepare, file, and serve a Record of Appeal within 60 days of today’s date.
- iv. That this matter shall be mentioned on 5th June 2024 to confirm compliance and for further directions.

13. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 17TH JANUARY 2024.

S. N. MUTUKU

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JUDGE



I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

