



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kinyua v Nyaga (Civil Appeal E040 of 2024)
[2024] KEHC 10892 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 10892 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E040 OF 2024
LM NJUGUNA, J
SEPTEMBER 18, 2024**

BETWEEN

EMILIO KINYUA APPLICANT

AND

EUSEPHIA MARIGU NYAGA RESPONDENT

RULING

1. The applicant filed a notice of motion dated 22nd April 2024, which is supported by the grounds set out on its face and the facts deposed in the supporting affidavit thereof. The orders sought are as follows:
 - a. Spent;
 - b. That this honourable court be pleased to issue a temporary stay of the order and all further proceedings of Hon. J.A. Otieno made on 19th April 2024 in CMCC 219/2019;
 - c. That this honourable court be pleased to issue an order staying the sale of the appellant's land parcel number Kaagari/Kanja/12050 scheduled for Wednesday 24th April 2024 pending hearing and determination of this application interparties; and
 - d. That this honourable court be pleased to issue an order staying execution of decree in CMCC 219/2019 by way of sale of the appellant's land parcel number Kaagari/Kanja/12050 pending hearing and determination of the appeal herein; and
 - e. That the costs of this application be provided for.
2. The court granted the orders on an interim basis, to last until determination of the application.
3. It is the applicant's case that interlocutory judgment was entered against him on 14th November 2023 in CMCC 219/2019 but he was never served with the plaint, the summons to enter appearance and notice of entry of judgment. That consequently, he was served with a 45-day redemption notice and



a notification for sale of his land. That he has been condemned unheard hence the appeal herein. He stated that he had sought similar orders from the trial court but the application was scheduled for hearing on 08th May 2024, regardless of the urgent nature of the orders sought. That if the orders are not granted, the appeal will be rendered an academic exercise.

4. The respondent filed a replying affidavit stating that the appellant was served and he accepted service of the plaint, summons to enter appearance and all accompanying documents within Embu Town and an affidavit of service was filed. That the respondent even filed an application seeking to amend pleadings but the applicant failed to participate in prosecuting the same despite having been served with the same. The amended pleadings were also served upon the appellant but he refused to accept service and failed to enter appearance. The respondent obtained judgment against the appellant. The respondent termed the application as an abuse of the court process and urged the court to dismiss it.
5. The application was canvassed by way of written submissions.
6. The applicant submitted that the land in question is his only source of livelihood and that if he loses it through the auction, the loss cannot be compensated by way of damages. He relied on the cases of *Wachira Karani v. Bildad Wachira* (2016) eKLR and *David Gicheru v. Gicheba Farms Limited & Another* (2020) eKLR. He argued that the law and procedure should be grounded on rules of natural justice which demand that a party should not be condemned unheard. That the trial court did not give its reasons for denying similar orders sought before it. He urged that if the land is sold, he will remain destitute since he lives on the land with his family. He further relied on the case of *CMC Holdings Ltd v. Nzioki* (2004) KLR 173 and urged the court to allow the application.
7. The respondent submitted that both the application herein and the appeal are incompetent in the eyes of Order 43 Rule 1 subrule 2 of the *Civil Procedure Rules* since the appeal is not as of right. Reliance was placed on the case of *Radio Africa Limited v. Dewdrop Enterprise Limited & Andrew Kibe Mburu* (2020) eKLR. The respondent urged the court to dismiss the application and the appeal summarily under section 79B of the *Civil Procedure Act*.
8. The issue for determination is whether the application has merit.
9. On 23rd April 2024, the court considered the application and granted interim orders to last until interparties hearing. On the hearing date being 29th April 2024, the court extended the orders to 22nd May 2024 when the matter would be mentioned for compliance before the Deputy Registrar. One of the interim orders granted was stay of proceedings in CMCC 219/2019. The applicant herein filed a similar application before the trial court but no interim orders were granted therein and the trial court gave a hearing date for the application.
10. The applicant was apprehensive of losing his property and so he filed the application herein where the interim orders were issued. On 08th May 2024 when the similar application was scheduled to be heard before the trial court, the application was dismissed and the file closed, regardless of the fact that at the time, this court had already issued an order of stay of proceedings in that lower court matter, albeit on interim basis pending determination of the application. With regards to prayer (b) herein none of the parties has moved this court for setting aside of the findings of the trial court but there is, indeed, a finding therein. However, the memorandum of appeal having been filed within time and the trial court having become functus officio, this court is still seized of jurisdiction to determine the application herein in its entirety.



11. That being said, I now turn to the issue of stay of execution. Order 42 Rule 6(2) of the Civil Procedure Rules states:

- “(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.”

12. The application herein was filed promptly 3 days after delivery of the impugned judgment. There is no delay in bringing the application. The applicant is contesting the judgment stating that he was not heard at the trial and especially that he was not served with the pleadings. Judgment was entered against him in the sum of Kshs.523,150/= and the same is to be recovered from auction of his named parcel of land. He has not offered any form of security for the decree.

13. The respondent submitted that the application together with the appeal are incompetent since the applicant did not seek leave of court before filing the appeal. In my view, the argument should be canvassed during hearing of the substantive appeal and not through the present application. Order 46 Rule 6 of the Civil Procedure Rules does not limit the applicant from bringing an application for stay of execution pending appeal, regardless of the merits or otherwise of the appeal.

14. Therefore, I find that the application has merit. The following orders shall issue:

- a. Stay of execution of decree in CMCC 219/2019 by way of sale of the appellant’s land parcel number Kaagari/Kanja/12050 is hereby granted pending hearing and determination of the appeal herein, on condition that the applicant deposits the whole decretal amount in court within 30 days of this ruling;
- b. The appellant/applicant to file the record of appeal within 21 days of this ruling;
- c. The costs of the application shall abide the outcome of the appeal.
- d. Thereafter, the appeal to be prosecuted within 45 days failing which it shall stand dismissed.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF SEPTEMBER, 2024.

L. NJUGUNA

JUDGE

..... for the Appellant /Applicant

..... for the Respondent

