



**Gathogo & another v Kamiri (Environment and Land Appeal
E032 of 2023) [2024] KEELC 94 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 94 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E032 OF 2023
YM ANGIMA, J
JANUARY 18, 2024
(FORMERLY NYAHURURU ELCA NO E021 OF 2021)**

BETWEEN

MARY MUTHONI GATHOGO 1ST APPELLANT

STEPHEN WATUTI GATHOGO 2ND APPELLANT

AND

JAMES WAINAINA KAMIRI RESPONDENT

RULING

A. Appellants' Application

1. By a notice of motion dated 24.10.2023 brought under Sections 1A, 1B & 63(e) of the *Civil Procedure Act* (Cap.21) and Order 42 Rule 6(1) of the *Civil Procedure Rules* (the Rules) and all other enabling provisions of the law the Appellants sought a stay of execution of the judgment and decree of the trial court dated 29.09.2021 in Nyahururu CM ELC No. 128 of 2018 pending the hearing and determination of an intended appeal to the Court of Appeal against the judgment of this court dated 12.10.2023 affirming the decision of the trial court.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Appellant, Mary Muthoni Gathogo, on 24.10.2023. The Appellants stated that they had already filed a notice of appeal intimating their intention to appeal to the Court of Appeal against the judgment of 12.10.2023. They contended that unless a stay of execution was granted they stood the risk of eviction from the suit property and demolition of their house. They contended that in the event they shall suffer substantial loss as their intended appeal may thereby be rendered nugatory. The Appellants offered to continue utilizing the title deed for Title No. Nyandarua/Ndemi/6643 as security for due performance of the decree.



B. Respondent's Response

3. The Respondent filed a replying affidavit sworn on 18.12.2023 in opposition to the said application on several grounds. First, it was contended that having dismissed the Appellants' appeal vide its judgment of 12.10.2023, this court was functus officio hence it had no power to entertain further proceedings in relation thereto. Second, that the application was merely intended to deny him the fruits of his judgment. Third, that the Appellants had not satisfied the legal requirements for a grant of stay pending appeal and in particular the aspect of substantial loss. Fourth, that the application was misconceived and devoid of merit hence it should be dismissed with costs.

C. Directions on Submissions

4. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were subsequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellants' submissions were filed on or about 29.12.2023 whereas the Respondent's submissions were not record by the time of preparation of the ruling.

D. Issues for Determination

5. The court has considered the Appellant's notice of motion dated 24.10.2023, the replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the following are the key issues for determination in this matter:
 - a. Whether the Appellants have satisfied the requirements for the grant of a stay pending appeal.
 - b. Who shall bear costs of the application.

E. Analysis and Determination

a. Whether the Appellants have Satisfied the Requirements for the Grant of a Stay Pending Appeal

6. The court has considered the material and submissions on record on this issue. Whereas the Appellants contended that they had satisfied all the requirements for the grant of a stay pending appeal, the Respondent contended otherwise.
7. Order 42 rule 6(2) of the Rules on the legal requirements for a stay pending appeal stipulates as follows:
 - “(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.”

8. It is evident from the material on record that the Appellants have been in possession and occupation of the suit property for a considerable period of time. It is also evident from the material on record that they have developed the same by constructing a permanent residential house thereon in the belief that they were the legitimate owners of the suit property. The court is satisfied on the basis of the material on



record that the Appellants stand to suffer substantial loss if they were to be evicted and their residential house demolished before their intended appeal to the Court of Appeal is heard and determined.

9. The material on record shows that the judgment of this court sitting as an appellate court was delivered on 12.10.2023 whereas the instant application for stay was filed on or about 26.10.2023. The court is thus of the opinion that the instant application was filed without unreasonable delay within the meaning of Order 42 rule 6(2) of the *Rules*.
10. The court is of the view that given the nature of the reliefs which were granted by the trial court it shall not be necessary for the Appellants to provide security for due performance of the decree which may ultimately be binding upon them save for the order on costs and general damages. Should the Appellants be unsuccessful before the Court of Appeal they may still be evicted from the suit property and their house demolished. The court is thus inclined to maintain the security provided by the Appellants in their earlier application for stay dated 05.11.2021.

b. Who Shall Bear Costs of the Application

11. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. In view of the nature of the application and the fact that the intended appeal to the Court of Appeal may either affirm or reverse the judgment of this court, the court is of the opinion that the appropriate order to make is that costs of the application shall abide the outcome of the intended appeal to the Court of Appeal.

F. Conclusion and Disposal Order

12. The upshot of the foregoing is that the court is satisfied that the Appellants have satisfied the requirements for the grant of an order of stay of execution pending appeal to the Court of Appeal. As a consequence, the court makes the following orders for disposal of the notice of motion dated 24.10.2023:
 - a. There shall be a stay of execution of the judgment and decree of the trial court dated 29.09.2021 in Nyahururu CM ELC No. 128 of 2018 for a period of two (2) years from the date hereof, or until the hearing and determination of the intended appeal to the Court of Appeal, whichever comes first.
 - b. The Appellants shall maintain the original title deed for Title No. Nyandarua/Ndemi/6643 in court pending the hearing and determination of their intended appeal to the Court of Appeal.
 - c. Costs of the application shall abide the outcome of the intended appeal to the Court of Appeal.Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 18TH DAY OF JANUARY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

Y. M. ANGIMA

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JUDGE

In the presence of:



Ms. Eunice Ndegwa holding brief for Mr. Gakuhi Chege for the Appellants

Mr. Kinyua Njogu for the Respondent

C/A - Carol

