



Nchebere & another v M’Ibaya & 4 others (Environment and Land Appeal E002 of 2023) [2024] KEELC 3683 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 3683 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E002 OF 2023
CK YANO, J
FEBRUARY 15, 2024**

BETWEEN

**KANANGA NCHEBERE 1ST APPELLANT
PAUL KIGEA NABEA (DECEASED AND SUBSTITUTED BY KIGEA AMOS
KILEMI & PASKWALE MWITI KIGEA) 2ND APPELLANT**

AND

**FRANCIS MURIUNGI M’IBAYA 1ST RESPONDENT
FRANKLIN MUGAMBI 2ND RESPONDENT
CHRISTINA MWONJARU (DECEASED SUBSTITUTED BY SAMUEL
MUCHENA KUBAI) 3RD RESPONDENT
GEORGE MUTUMA 4TH RESPONDENT
JOHN KARITHI M’IMBAYA (LEGAL REP OF MUTHURI KIMATHI –
DECEASED) 5TH RESPONDENT**

*(Being an appeal for the Judgment of the Principal Magistrate Court Delivered by
Hon. P. Wechuli – PM dated 30th June, 2023 in Tigania ELC. NO. 55 of 2011)*

RULING

1. This Ruling is in respect of two applications. The first one is the Notice of Motion Notice of Motion dated 14th July 2023 in ELC Appeal NO. E002 of 2023 and the second one is the Notice of Motion dated 19th July, 2023 in ELC Appeal No. E004 of 20023. The two appeals were Consolidated with ELC Appeal No. E002 of 2023 being the lead file. Both applications are seeking orders of stay of execution of the judgment/decree in Tigania ELC case No. 55 of 2011 delivered on 30th June 2023 pending the hearing and determination of the appeals herein.



Application Dated 14-7-2023

2. In the application, the applicants aver that they have been the legal occupants/owners of LR. 6123 AND 4419 Antuamburi Adjudication Section. That judgment was delivered in the lower court against them to the effect that the said parcels of land belong to the 5th respondent. It is their contention that their appeal has high chances of success and that it is in the interests of justice that the said Judgment/decree is stayed pending the hearing and determination of the appeal.
3. The application is also supported by an affidavit sworn by the applicants on 14th July, 2023 wherein they reiterate the above grounds. That the decree of the trial court ordered for the applicants to be evicted within 30 days. The applicants aver that should the said decree be executed, they are bound to suffer irreparable damage since they have intensively developed the land by carrying out constructions. The applicants have annexed copies of the judgment and decree of the lower court, photographs of their developments on the land, a letter from the land's office indicating the intended implementation of the said decree and a response o by the applicants, a letter requesting for typed proceedings and the Memorandum of Appeal.
4. In opposing the application, Francis Murungi M'ibaya, the 1st respondent filed a replying affidavit sworn on 23rd August, 2023 wherein he states inter alia, that the application was made prematurely because stay of execution of 30 days granted by the trial court are still subsisting. It is therefore his contention that the application does not lie, is bad in law, an abuse of the process of the court, inconsistent and fatally defective. He also pointed out that the 1st appellant/applicant dd not testify before the trial court and the application and the appeal are not only baseless but unfounded. That the prayer for eviction before the trial court was brought vide an amended plaint dated 30th March, 2022 to which the applicant never filed any defence.
5. The 1st respondent further states that the applicants never challenged this court's judgment and orders of 14th July, 2020 in ELC Appeal No. 60 of 2018 referring the suit to the lower court for hearing and determination on merit. That both the application and the appeal are also contradictory and self-defeating in that the applicants have sued the 2nd, 3rd, 4th and 5th respondents who were their co-defendants in the trial court. That similarly, in Meru ELC. Appeal No. E004 of 2023, the 3rd and 4th respondents have sued the applicants herein as respondents. That ideally, they have sued each other in their respective appeals, and accuse them of working in cahoots so as to frustrate the decree in Tigania ELC No. 55 of 2011.
6. The 1st respondent states that the alleged developments on the suit land (if any) could only have been put up on the suit land(s) in contravention of clear court orders granted by the trial court on 2nd August 2011, hence the court cannot be called upon to sanitize and protect acts of disobedience of court orders. The 1st respondent avers that the appeal herein is not arguable and has no chances of success. Further, that the application is not made in good faith as the applicants have not offered to deposit any security for costs as required by law. The 1st respondent states that it is in the interest of justice that the application be dismissed with costs.

Application Dated 19-7-2023

7. The application is supported by the affidavit of George Mutuma sworn on 19th July 2023 and is based on the grounds that the applicants were aggrieved by the judgment entered in the lower court in favour of the respondents and have lodged ELC Appeal No. E004 of 2023 which they contend has high chances of success. That no prejudice or hardship shall be occasioned to the respondents if stay is granted as the suit land LR. No. Mikinduri/4946 and 6323 belonging to the applicants has never been



sold or transferred to the respondents or any third parties. The applicants aver that they are in actual possession and occupation of the said land having immense developments therein. That the applicants stand to suffer irreparable damages if the orders sought are not granted.

8. In the supporting affidavit the applicants aver inter alia that the respondents are moving with unprecedented speed to implement the judgment/decreed of the lower court as they have instructed the county surveyors to re-establish boundaries in line with the judgment of the trial court. That they have built houses on the suit land where they stay with their families including school going children and that any eviction will cause disruption of their lives. That they stand to suffer great loss and damages, adding that the appeal would be rendered nugatory. The deponent has annexed copies of the judgment, consent, letter from the County Survey and photographs showing the applicants developments and children.
9. Francis Murungi M'ibaya the 1st respondent filed a replying affidavit dated 23rd August, 2023 whose contents more or less mirror the one filed in response to the applications dated 14th July, 2023. He has also annexed copies of the same documents.
10. The applications were canvassed by way of written submissions which were duly filed by both parties. I have read and considered the said submissions and I need not reproduce the same in this ruling.

Analysis And Determination

10. I have considered the applications, the response made and the submissions filed. In my view the only issue for determination is whether the applicants have met the criteria for the grant of orders of stay pending appeal.
11. The principles upon which stay of execution pending appeal may be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the *Civil Procedure Rules* which gives the court discretionary powers to stay execution pending appeal and provides as follows:-

“6(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 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”.



12. The Court of Appeal in the case of *Butt Versus Rent Restriction Tribunal* (1982)eKLR 417 gave guidance on how a court should exercise the said discretion and held that:
- “ 1. The powers of the court to grant or refuse an application for stay of execution is discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle 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.
 3. 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.
 4. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of Appeal.
 5. The court in exercising its powers under order XLI Rule 4(2) of the [Civil Procedure Rules](#) can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse”.
13. In the case *RWW Versus EKW* [2019]eKLR, it was stated that:- “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. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent”.
14. Therefore, for an applicant to move the court into exercising its discretion to stay execution pending appeal, the applicant must satisfy the court that substantial loss may result to him unless stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for the due performance of the decree.
15. The purpose of stay pending appeal is also to preserve the substratum of the case while the appeal is pending so that the Appeal may not be rendered nugatory. However, in exercising its discretion on whether or not to grant stay, the court should weigh the rights of both the appellant against the successful litigant who should not be deprived from enjoying the fruits of his judgment.
16. In the case of *Victory Construction Versus BM (a minor suing through next friend one PMM)* (2019) eKLR, the court stated that “The court in deciding whether or not to grant a stay of execution, the overriding objective stipulated in Section 1A and 1B of the [Civil Procedure Act](#) should also be taken into consideration”. The court further stated that the court is no longer limited to the provisions of Order 42 Rule 6 adding that the courts are now enjoined to give effect to the overriding objectives of the Act and Rules in exercise of its power under the [Civil Procedure Act](#) or interpretation of any of its provisions.



17. On the first criterion as set out in Order 42 Rule 6, that is whether the applications have been brought without unreasonable delay, the judgment in the lower court was delivered on the 30th June, 2023 while the applications herein were filed on 14th July, 2023 and 19th July, 2023. I find that there was no delay in filing the applications herein.
18. The second criterion is whether the applicants have demonstrated that they are bound to suffer substantial loss if the orders of stay of execution are not granted. In *Silverstein Versus Chesoni* (2002) IKLR867, the issue of what comprises substantial loss was held as follows:-

“The issue of substantial loss is what loss has to be prevented by preserving the status quo because such loss would render the appeal nugatory”
19. In each of the applications herein, the applicants have deposed that failure to grant the orders sought would expose them to eviction and demolition of their properties which will result to irreparable loss and render the appeals nugatory. I am persuaded that in both cases the applicants have satisfied the court that they stand to suffer substantial loss if the stay orders are not granted, and the eviction and demolitions are carried out. The appeals may also be rendered nugatory.
20. The other condition for granting stay orders is security to be offered. However, the issue of security is at the discretion of the court. Looking at the circumstances of this case, it would be in the interest of justice that security is not imposed upon the applicants. Instead, they are directed to fastrack the hearing of the appeals.
21. In the result, I find that the applications dated 14th July, 2023 and 19th July, 2023 are meritorious, and I hereby allow the same as prayed. Parties to bear their own costs. Let the Deputy Registrar call for the Original Trial Record from the Lower Court to pave way for directions on the disposal of the appeals.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 15TH DAY OF FEBRUARY, 2024

HON. C. YANO

ELC – JUDGE

In the presence of:-

Court Assistant: Kiragu

Mutungu for Maranya for Appellant

No appearance for Ndubi for respondents, who are present in court.

