



**Gathua v Nyarogo & 2 others (Environment and Land Appeal  
E020 of 2023) [2024] KEELC 1687 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1687 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND APPEAL E020 OF 2023  
EK MAKORI, J  
MARCH 20, 2024**

**BETWEEN**

**CYRUS NGARI GATHUA ..... APPELLANT**

**AND**

**SAKAYO ONGATI NYAROGO ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR LAMU COUNTY ..... 2<sup>ND</sup> RESPONDENT**

**HON ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. Notice of Motion dated 5<sup>th</sup> September 2023 seeks orders of stay pending appeal with costs.
2. The appellant averred that he is dissatisfied with the outcome of the trial Court's findings that he should be evicted from the suit property Lamu/Kenyatta I/1536 and the finding that the 1<sup>st</sup> respondent should be declared the rightfully registered owner of the same by transmission. He contends that he purchased the same from the relatives of the initial owner Oginga Ododi.
3. On the other hand, the 1<sup>st</sup> respondent contends that the trial in the Lower Court was conducted impartially. The appellant adamantly refused to have the suit progress until when he was forced to prosecute his case. Despite the efforts made by the Court, he did not participate in the hearing. His case was closed and the 1<sup>st</sup> respondent prosecuted the counter-claim. The court found for the 1<sup>st</sup> respondent and ordered the appellant to vacate the suit property within 90 days.
4. The 1<sup>st</sup> respondent contends that the appellant waited until the 90 days lapsed when he ought to have vacated the suit property and then filed the current appeal.
5. The 1<sup>st</sup> respondent believes the appellant is out to waste time as he did in the Lower Court since there is nothing to stay because the appellant refused to participate in the proceedings in that Court.



6. The Court directed that the application be canvassed through written submissions.
7. The 1<sup>st</sup> respondent submitted that the appellant's motion had failed to meet the threshold for the grant of stay orders citing several cases including *Butt v Rent Restriction Tribunal* [1979] eKLR on the conditions precedent before stay orders are granted.
8. The 1<sup>st</sup> respondent is of the view that not a single condition has been fulfilled by the applicant including that of depositing security and proposes on a without prejudice basis, the deposit of Kshs. 1,000,000/-
9. Having reviewed the materials and averments before me, the main issue for the determination of this Court is whether to grant a stay pending appeal.
10. The Lower Court ordered the eviction of the appellant and a declaration that the 1<sup>st</sup> respondent was the rightful owner of the suit property. It has been insinuated that the appellant refused to participate in the proceedings before the Lower Court (this I need not delve into), it can be considered in the main appeal if the Court takes that direction upon disposal of the current application.
11. The appellant will need a second chance to be heard which is his right.
12. The factors to consider before a stay is granted are as held in the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, a stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under Order 42 Rule 6 of the *Civil Procedure Rules*, that:

- a. The application is brought without undue delay;
- b. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
- c. 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.”

13. The current application was brought timeously as can be seen from the record. The trial Court delivered its ruling on 5<sup>th</sup> April 2023 and by 2<sup>nd</sup> of May 2023, the present application had been filed. The 1<sup>st</sup> test was achieved.
14. On the issue of substantial loss, this is a matter dealing with land as the substratum of the suit. Ownership and possession will be at the core of the appeal. In addressing the issue of sustaining the substratum of the subject matter pending appeal, in the case of *RWW v EKW* [2019] eKLR, the Court stated as follows:

“The purpose of an application for stay of execution pending an 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.



9. 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.”

15. Balancing the interests of the parties in this appeal, the 1<sup>st</sup> respondent is the beneficial owner of the suit property while the appellant seeks to be registered and extinguish the right of ownership over the suit property by the 1<sup>st</sup> respondent as ordered by the Court. It will be in the interest of justice to grant the stay orders pending appeal by ordering that the land in question remain registered in the beneficial interest of the 1<sup>st</sup> respondent pending appeal and, that the eviction be halted during the pendency of this appeal to preserve the substratum of the suit. Costs in the intended appeal.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 20<sup>TH</sup> DAY OF MARCH 2024.**

**E. K. MAKORI**

**JUDGE**

In the Presence of:

Ms Maina holding brief for Mr. Oduor for 1<sup>st</sup> Respondent

Court Clerk. Happy

In the absence of:

The appellant acting in person

The AG for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

