



**Ndegwa v Chweya & 2 others (Environment & Land Case  
359 of 2013) [2024] KEELC 1323 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1323 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 359 OF 2013  
FM NJOROGE, J  
MARCH 14, 2024**

**BETWEEN**

**JACKSON KAMAU NDEGWA ..... PLAINTIFF**

**AND**

**MERCY MAKENA CHWEYA ..... 1<sup>ST</sup> DEFENDANT**

**VIJAY LAXMI SHAH ..... 2<sup>ND</sup> DEFENDANT**

**DISTRICT LANDS REGISTRAR, NAKURU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. For determination is the 3<sup>rd</sup> Defendant's notice of motion application dated 5<sup>th</sup> July 2023 for orders: -
  - a. Spent.
  - b. Spent.
  - c. That the honourable court be pleased to order for stay of execution of the judgment/decree herein delivered and dated the 29<sup>th</sup> June 2023 and all the consequential orders thereto pending the hearing and determination of the intended appeal from the decree herein to the court of appeal.
  - d. That such other orders be made as is just and expedient in the interest of justice.
  - e. That costs of this application abide in the intended appeal.
2. The application is supported by the affidavit of the Applicant sworn on 5<sup>th</sup> July 2023. The Applicant's case is that he is aggrieved by the decision of this court delivered on 29<sup>th</sup> June 2023, wherein judgment was entered in favour of the Plaintiff herein and has since lodged a notice of appeal to challenging the judgment and decree. She further avers that although the judgment was against the three defendants, she stands to bear the substantial burden since the property subject of the suit and appeal is registered



in her name. That applicant is apprehensive that the risk of her being evicted is real if not imminent if the orders sought are not granted. The applicant states that her appeal stands a good chance of success and that it will be rendered nugatory if the orders sought are not granted. She adds that the Plaintiff is not in possession of the suit property and that he would not suffer any prejudice if the application is allowed.

3. In opposition, the Plaintiff filed a Replying Affidavit which he swore on 27<sup>th</sup> July 2023. According to the Plaintiff, the application lacks any basis and is intended to mislead the court; there is no one in occupation of the suit property, and the Applicant has failed to demonstrate that she stands to suffer substantial loss or that her intended appeal is arguable. To the Plaintiff, the applicant's aim is to forestall the course of justice.
4. In rebuttal, the Applicant filed a supplementary affidavit which she swore on 15<sup>th</sup> August 2023.
5. The application was canvassed by way of written submissions which I have carefully considered. The sole issue for determination is whether stay of execution of the judgment dated 29<sup>th</sup> June 2023 and all consequential orders arising therefrom should issue pending the hearing and determination of the intended appeal.

### **Analysis and Determination**

6. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides: -
  - “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.”
7. Further to the above, stay may be granted for any sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objectives stipulated in Sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions.
8. Therefore, an applicant seeking stay of execution of a decree or order pending appeal is obliged to satisfy the conditions that
  - (a) substantial loss may result to the applicant unless the order is made,
  - (b) the application has been made without unreasonable delay, and
  - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. It is also trite that the grant of an order for stay of execution is a discretionary one and must be exercised judiciously.
9. Judgment in this matter was delivered on 29<sup>th</sup> June 2023. A notice of appeal filed on 4<sup>th</sup> July 2023 and the present application was filed on 10<sup>th</sup> July 2023. The present application has therefore been made without unreasonable delay.



10. The next question is whether the applicant has satisfied this court that she stands to suffer substantial loss if stay is not granted? As to what substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

11. In the present case, the applicant avers that she stands to suffer substantial loss since the effect of execution of the impugned judgment will render her homeless and the title registered in her favour would be cancelled. She explained in her supplementary affidavit that the photographs exhibited by the Plaintiff did not depict the present status of the suit property and that they were taken before her occupation. She exhibited photographs of what she stated current status of the suit premises. Her occupation of the suit property was notably not questioned at the hearing of the main suit. The applicant told the court that she took physical possession of the suit property in the year 2013. In the circumstances, I am satisfied that the applicant has demonstrated the substantial loss that she would suffer if stay is not granted.
12. 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 or her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs (See *RWW v EKW* [2019] eKLR).
13. Although the applicant has not expressed whether she is ready to offer security of costs, this Court is of the opinion that the Applicant can be directed by the Court to do so.
14. The upshot is that the application dated 5<sup>th</sup> July 2023 is allowed in terms of prayer no 3 thereof subject to the following conditions: the applicant shall deposit with the court Kshs 200,000/- (Kenya Shillings Two Hundred Thousand only) within 45 days of this order as security for costs of the appeal. In addition, she shall, if she has not already done so, file and serve the Record of Appeal upon the respondent within 45 days from the date hereof. In default of either one or both of the conditions set out in this paragraph, the orders of stay granted shall stand automatically vacated and execution shall issue.
15. Costs of the instant application shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 14<sup>TH</sup> DAY OF MARCH 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**



