



**Nyakongo v Rogito & 3 others (Environment & Land Case  
309 of 2017) [2024] KEELC 1633 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1633 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 309 OF 2017**

**A OMBWAYO, J  
MARCH 14, 2024**

**BETWEEN**

**ELISHA PETER NYAKONGO ..... PLAINTIFF**

**AND**

**KENNEDY ANUNDA ROGITO ..... 1<sup>ST</sup> DEFENDANT**

**SAMWEL KIMOTHO WAWERU (SUED AS THE COORDINATOR  
OF THE CATHOLIC DIOCESE OF NAKURU SETTLEMENT  
PROJECT) ..... 2<sup>ND</sup> DEFENDANT**

**CATHOLIC DIOCESE OF NAKURU (REGISTERED TRUSTEES) .... 3<sup>RD</sup>  
DEFENDANT**

**NAKURU DISTRICT LANDS REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. Kennedy Anunda Rogito (hereinafter referred to as the applicant) was the 1<sup>st</sup> defendant in this suit and now he is the judgment debtor. He has come to this court with the application dated 22<sup>nd</sup> January 2024 seeking orders that the Honorable Court be pleased to stay the execution of the judgment/decreed dated 26<sup>th</sup> October 2023 and all consequential orders thereto pending the hearing and disposal of the intended appeal in the Court of appeal. That the Honorable court makes such orders as it deems just and expedient in the interest of justice and that costs of this application abide the outcome of the intended appeal.
2. The application is based on grounds that the 1<sup>st</sup> Defendant/Applicant being dissatisfied and aggrieved by the judgment dated 26<sup>th</sup> October 2023 has lodged a Notice of Appeal against the judgment in its entirety. The intended appeal, as shown in the Draft memorandum of Appeal attached to this application, raises weighty issues on matters of fact and law, has plausible chances of success and ought to be disposed of on merit in the Court of Appeal. The judgment dated the 26<sup>th</sup> October 2023, though



pronounced against all the Defendants as joint and several is only executable against the 1<sup>st</sup> Defendant/Applicant herein.

3. The Judgment dated 26<sup>th</sup> October 2023 does not resolve all the issues before the court and leaves the 1<sup>st</sup> Defendant/Applicant dependent on future uncertain events, to wit, valuation, to his detriment. The 1<sup>st</sup> Defendant/Applicant is genuinely apprehensive of being evicted and being ruined financially by removal from LR Njoro Ngata/block 20/ 152, which he has substantially developed. The 1<sup>st</sup> Defendant/Applicant believes that his appeal has high chances of success and the same shall be rendered nugatory if execution is allowed to proceed. That unless the orders herein sought are granted, the Plaintiff/Respondent shall commence execution of the judgment causing the 1<sup>st</sup> Defendant/Applicant to substantial loss. That the orders proposed herein do not prejudice the Plaintiff/Respondent in any manner. That it is fair and just that the orders proposed herein be granted.
4. In the supporting affidavit, he states that his original reaction to the judgment was to seek indemnity from the interested parties, which approach has not borne any fruit.
5. The judgment in this matter places an onerous and illegal burden on him, the court having found the interested parties and a party not sued, were culpable in frustrating the sale between the Plaintiff/Respondent and the Interested Parties, the consequential orders made are only against him.
6. He intends to appeal the basic premises of the judgment including the conclusion that he was a beneficiary of a fraud and or illegality in which he did not participate and for which no evidence was led against him.
7. He also intends to impugn the judgment on the conclusion made that an inchoate agreement for sale of a plot between the Plaintiff/Respondent entitles him to the parcel in issue and not damages for breach of contract between the parties.
8. He also intends to impugn the judgment for awarding the Plaintiff/Respondent the parcel without the basic preliminaries of even payment of stamp duty and other processes, a fact that he intends to pursue as unjust enrichment. According to the Plaintiff/Respondent invested Kshs 80,000 in an application for a plot in a settlement scheme and did not participate in any other process, including survey, application for consent, transfer and title processing, for 12 years when the option was offered to the applicant and he completed the process by payment to the interested parties all the necessary processing fees.
9. On 8<sup>th</sup> November 2023, through his previous advocates on record, he filed Notice of appeal and on the 8<sup>th</sup> December 2023 he applied for certified copies of proceedings in this matter and made a deposit thereof.
10. The Plaintiff/Applicant has communicated with his previous advocates and indicated his intention to execute the judgment on terms clearly detrimental to his interests.
11. The Plaintiff/Respondent has placed an arbitrary and excessive value for the parcel of land that is 3,500,000/ in a zone where the size of parcel of 50x100 is sold at Kshs 700,000/, indicating to him the clear intention to profiteer at his expense. The Plaintiff/Respondent has never been in possession of the parcel and or occupied it and stands to lose nothing if the orders proposed herein are issued.
12. At the point of his entry to the parcel, the Plaintiff/Respondent had not concluded the process of purchase from the interested parties as he was yet to pay survey and transfer fees, obtain consent for transfer and execute any transfer documents, all of which he undertook and completed.



13. Order 42 rule 6 deals with stay of execution pending appeal thus :-

6. Stay in case of appeal [Order 42, rule 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 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. (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

14. I do find that the application herein has been filed timeously as the same was registered on 25<sup>th</sup> January 2024 approximately within the 90 days period given by the court to pay the market price.

15. The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

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.”

16. The applicant is not opposed. I do grant a stay the execution of the judgment/decreed dated 26<sup>th</sup> October 2023 and all consequential orders thereto pending the hearing and disposal of the intended appeal in the Court of appeal. That costs of this application abide the outcome of the intended appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 14<sup>TH</sup> DAY OF MARCH, 2023.**

**A. O OMBWAYO**

**JUDGE**

