



**Gichobi v Gathua (Environment and Land Appeal E004 of 2022)
[2024] KEELC 4009 (KLR) (12 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E004 OF 2022
A KANIARU, J
MARCH 12, 2024**

BETWEEN

SAMWEL MURIITHI GICHOBI APPLICANT

AND

MARGARET WAMBUI GATHUA RESPONDENT

RULING

1. What is before me for determination is a Notice of motion dated August 11, 2022 filed in court on the same date. It is expressed to be brought under Order 42 Rule 6 of Civil Procedure Rules and section 3A of the Civil Procedure Act (Cap 21). The applicant Samwel Muriithi Gichobi has prayed for the following orders.
 1. That there be a stay of execution of the decree of the lower court in Magistrates court, Siakago , ELC No. 12 of 2020 dated April 13, 2022 pending hearing and determination of the appeal
 2. That costs of this application be in the cause.
2. The application is premised on the grounds *interalia*, that the Appellant/Applicant has been in possession and occupation of the suit land since the year 2007 and has extensively developed it by erecting permanent buildings and is residing there with his family and dependants; that he was grossly aggrieved by the judgement of the lower court and appealed against its decree dated April 13, 2022; and that he will suffer irreparable damages if the orders sought are not granted.
3. The application came with a supporting affidavit which more elaborately explains why the prayers are sought.
4. The respondent replied to the application vide a replying affidavit filed on November 17, 2022. She termed the application as incompetent, bad in law and an abuse of the court process. According to the respondent, there was undue delay in filing the application. She deposed that the applicant bought



property from somebody who pretended to be her but who did not have the necessary documents. That happened while she herself was sick and in hospital. The appeal was said to have no merit and the court was urged to dismiss the application.

5. The application was canvassed through written submissions. The appellant's submissions were filed on May 2, 2023 and he submitted, *inter alia*, that his appeal has high chances of success; that he has demonstrated good faith to prosecute his appeal; that the respondent will not be prejudiced in any way if the orders sought are granted; and that his application has merit and should be allowed.
6. The respondent's submission were filed on March 2, 2023. According to the respondent, the appeal by the applicant is not likely to succeed; the application has not been filed expeditiously; and the appellant has not demonstrated likelihood of suffering substantial loss. The appellant was also faulted for not providing security for costs as earlier ordered by the court.
7. I have considered the application, the response filed by the respondent, and the rival submissions. An order for stay of execution is not a right of a party. It is not even the primary consideration of a court of law where a judgment on the merits of a case has been given. The primary consideration is usually that the party in whose favour a judgment has been given is entitled to the fruits of that judgment. Stay of execution therefore comes across as a secondary consideration and is only granted where the requisite threshold set by the law is met.
8. The statutory threshold is to be found in order 42 Rule 6 of [Civil Procedure Rules](#) which obligates a party desiring to get the order to satisfy the court that substantial loss is likely to occur if the order is not granted. The party is also supposed to seek the order within a reasonable time, and he is also supposed to furnish the security for costs.
9. The jurisprudence that has emanated from our court requires that a party desiring to get the order must demonstrate that he has an arguable appeal and that if the order is not granted the appeal will be rendered nugatory.
10. What is before me is an application seeking an order of stay filed by a party who fears that he might be evicted from land on which he resides with his family. The judgment was clear that the appellant should be evicted. It is clear to me that if eviction is carried out, the appellant is likely to suffer substantial loss.
11. I have also looked at the memorandum of appeal filed by the appellant. The appeal seems arguable to me and it appears to me also that the appeal can be rendered nugatory in the event the appellant is successful in the appeal. I make this observation because if the appellant's home is demolished and his livelihood from the land destroyed or disrupted, then the success in the appeal will not be very useful to him.
12. I realize that the respondent has alleged that there was inordinate delay in filing the application. It was pointed out that there was a period of about five (5) months from the time the judgment was delivered to the time the application was filed. I think it is not correct to say that there was a delay of five (5) months. The judgment was delivered on April 13, 2022. The period in between is about four (4) months, not five (5) as alleged. I don't consider that period inordinate. It is easy to appreciate that it takes time, money and expertise to prepare for an appeal. In the case of [Jaber Mohsen Ali & another vs. Priscilla Boit & another E & L no. 200 of 2012](#) [2014] eKLR the court emphasized that what is unreasonable delay is dependent on the circumstances of each case. My reading of the record before me leads me to conclude that a period of four (4) months does not amount to inordinate or inexcusable delay.



13. In reaching the final decision, I bear in mind the instructive observation made by the court in the case of *RWW vs EKW* [2019] eKLR which I reproduce here ipssisma verba:

“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 safe guided and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of the litigant who should not be deprived of the fruits of his /her judgment. The court is also called upon 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 appeal with those of the respondent.”

14. Considering the circumstances of the case, I am persuaded that the interests of justice are better served by granting an order of stay.

15. As is usual in cases where an order of stay is granted, the appealing party is supposed to deposit security for costs. It is in light of the forgoing that I allow the application herein and grant an order of stay of execution as sought. The appellant however will have to deposit 50,000 as security for costs within the next sixty (60) days failing which the order of stay will lapse.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 12TH DAY OF MARCH, 2024.

A. KANIARU

JUDGE-ELC, EMBU

In the presence of the Appellant/Applicant, and in the absence of the Respondent.

Court Assistant: Leadys

Interpretation: English /Kiswahili

