



**Chepkirui v Kusero & another (Environment and Land Appeal  
E038 of 2023) [2024] KEELC 3977 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3977 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E038 OF 2023**

**JG KEMEI, J**

**APRIL 29, 2024**

**BETWEEN**

**EVALYNE CHEPKIRUI ..... APPELLANT**

**AND**

**GEOFFREY TURERE KUSERO ..... 1<sup>ST</sup> RESPONDENT**

**LAND REGISTRAR, RUIRU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before Court is the Appellant/Applicant's Notice of Motion dated 28/9/2023 seeking in the main stay of execution of the trial Court Judgment delivered on 15/8/2023 in Ruiru ELC No. E 015 of 2022.
2. The Application is premised on the grounds that the Applicant has filed her Memorandum of Appeal but she is apprehensive that the Respondent will proceed to dispose of Ruiru Kiu Block 2/23708, Ruiru Kiu Block 2/23709 and Ruiru Kiu Block 2/23710, the suit properties. That if the stay orders sought are not granted, the Appellant contends that her Appeal, will be rendered nugatory.
3. The Application is further supported by the Affidavit of even date of Evalyne Chepkirui, the Applicant. She averred that her Appeal was timeously filed with the 45 days' interim stay of execution period granted by the trial Court. That she is ready and willing to furnish any security if required to do so. The Applicant annexed copies of the Memorandum of Appeal dated 14/9/2023 as 'EC1'.
4. Geoffrey Turere Kusero swore his Replying Affidavit on 12/3/2024 and averred that he is the registered owner of land parcel Ruiru Kiu Block 2/23708, 23709 and 23710 as shown by copies of title deeds marked GTK a, b & c. That the Applicant personally transferred the said land parcels to him after attending land control board and obtaining consent thereat and now ought to enjoy the fruits of his Judgement as a successful litigant. That the Applicant has not demonstrated any prejudice she stands to suffer if he utilizes his land and enjoys the rights under Section 26 *Land Registration Act*. Further that the Application is unmerited for want of a decree or judgment to be stayed.



5. The Application was argued orally before Court on 13/3/2024.
6. The main issue for determination is whether the Application is merited.
7. The legal provisions for stay of execution are anchored in Order 42 rule 6 of the [Civil Procedure Rules](#) that;

“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 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.”

8. It is trite that for an Applicant to succeed in an Application of this nature, one must establish three conditions namely; establishment of substantial loss, timely filing of the Application and the furnishing of security. An order for stay of execution is discretionary upon proving sufficient cause by satisfying the aforesaid conditions.
9. The Applicant expresses her apprehension that the Respondent may proceed to execute the trial Court judgment to her detriment and ultimately render her Appeal nugatory.
10. Has the Applicant demonstrated any substantial loss he is likely to suffer if an order of stay is denied? Discussing the scope of execution viz proof of substantial loss, Gikonyo J described it as follows in [James Wangalwa & Another Vs. Agnes Naliaka Cheseto \[2012\]](#) eKLR:-

“... the fact that the process of execution has been put in motion, by itself, does not amount to substantial loss .... 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. That is what substantial loss would entail ...”



11. In addition, the ingredients of substantial loss were well captured by Kuloba J (as he then was) in the case of *Machira T/A Machira & Company Advocates Vs. East African Standard (No 2) 2002* 2 KLR as follows: -

“If the Applicant cites as a ground, substantial loss the kind of loss likely to be sustained must be specified, details or particular thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the Applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the Applicant’s business (e.g. Appeal or intended Appeal).”

12. The Judge went on to add that: -

“Moreover, a Court will not order a stay upon a mere vague speculation; there must be the clearest ground of necessity disclosed on evidence. Another common factor in favour of the Applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the Appellant or intended Appellant of the means of prosecuting the Appeal or intended Appeal. So, really, stay is normally not granted, save in exceptional circumstances.”

13. It is trite therefore that the execution itself does not amount to substantial loss. The Applicant needs to show the state of affairs that will be rendered nugatory if the same is not allowed. The Applicant in her Supporting Affidavit averred that she is ready and willing to abide by any terms as the Court may deem fit. That should the Respondent dispose the suit properties she stands to suffer loss in the event that her Appeal ultimately succeeds.

14. On the limb of timeous filing of the Application, the Application was filed in September 2023, about a month after delivery of the assailed Judgment. The Application was filed well within the interim stay of execution of 45 days granted by the trial Court. Accordingly, I am of the view that the Application was timeously filed.

15. The last precondition in an Application of this nature is an offer for security for the due performance of the decree by the Applicant. No offer for security has been proffered by the Applicant save the undertaking to comply by Court’s terms if so directed.

16. The totality of the foregoing is that the Applicant has not adequately demonstrated substantial loss to grant the orders for stay of execution. Be that as it may, purely in the interest of justice and to ensure that the Appeal is not rendered nugatory, the Application is allowed.

17. Costs of the Application be in the cause.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 29<sup>TH</sup> DAY OF APRIL, 2024.**

**J G KEMEI**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed



**DEPUTY REGISTRAR**

**Delivered online in the presence of;**

Ms. Moragia for Appellant

Wachira HB Kanyi for 1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent - Absent

Court Assistants – Phyllis/Oliver

