



Kanja & another v Wanjohi & another (Suing as the Personal Representatives of the Estate of Martin Kamau Kanja (Deceased)) (Environment and Land Appeal E021 of 2023) [2024] KEELC 3461 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3461 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E021 OF 2023
LC KOMINGOI, J
APRIL 25, 2024**

BETWEEN

MARY WANDIA KANJA 1ST APPELLANT

HANNAH NYOKABI KANJA 2ND APPELLANT

AND

JULIA WANJIRU WANJOHI 1ST RESPONDENT

PATRICK WANJOHI 2ND RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF
MARTIN KAMAU KANJA (DECEASED)**

RULING

1. This is the Notice of Motion dated 14th November 2023.
2. It seeks Orders;
 - i. Spent.
 - ii. spent.
 - iii. That this Hon. Court do issue a stay of execution of the judgement delivered on 9th November 2023 pending the hearing of the appeal.
 - iv. That costs of the application be provided for.
3. The grounds are on the face of the application. The same is also supported by the Affidavit of Mary Wandia Kanja. The 1st Appellant/Applicant avers that she is the lawful owner of parcel number Ngong/Ngong/63911 and that the Learned Trial Magistrate erred in finding otherwise. Further



that, should the judgement/orders be executed, there would be substantial loss and risk of losing homes occasioned to persons who purchased the property and were residing thereon. The Appellants/Applicants were also at a risk of being sued to refund the purchase price.

4. Julia Wanjiru Wanjohi in her Replying Affidavit deponed that she was evicted by the Appellants/Applicants from the suit property which was her matrimonial home sometime in 2021 after the death of her husband. The 1st Appellant then fraudulently transferred the property to herself without following due process and consequently sold it off to third parties. The trial court found that the transfer was fraudulent and ordered for cancellation and rectification of the register, hence the land to revert to the deceased. She thus prayed for dismissal of the application on grounds that she should be allowed to enjoy the fruits of the judgement since no prejudice would be occasioned to the Appellants.
5. The application was canvassed by way of written submissions.

The Appellants/Applicants Submissions

6. On whether a stay of execution pending Appeal should be issued, Counsel while making reference to Order 42 Rule 6(2) of the *Civil Procedure Rules* submitted that executing the judgement would lead to substantial loss to innocent purchasers who had immensely developed the property. Adding that the application had been made without delay as per Section 79G of the *Civil Procedure Act*. Reference was made to *David Kipkoskei Kimeli v Titus Barmasai* [2019] eKLR, *Charles Kariuki Njiru v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased))* [2020] eKLR and *James Wangalwa & another v Agnes Naliaka Cheseto* (2012) eKLR.
7. On the issue of security of costs, counsel submitted that the Applicants were ready and willing to adhere to the Court's directions on security.

The Respondents' Submissions

8. Counsel while citing *Century Oil Trading Co. Ltd v Kenya Shell Ltd* and *James Wangalwa (supra)* submitted that the application should be dismissed. This is because it was aimed at denying the Respondents' the fruits of their judgement; the Applicants did not have an arguable appeal with prospects of success; and they had not shown how they would suffer substantial loss if execution of the judgement is not stayed. Counsel added that the Respondents had been dependent on well-wishers to house them and going back to their home would not prejudice the Appellants.

Analysis and Determination

9. I have considered the Notice of Motion, the affidavit in support, the response thereto, the rival submissions and the authorities cited.

The issues for determination are:

- i. Whether the Appellants/Applicants application has met the set threshold for grant of stay of execution pending Appeal of the Judgement delivered on 9th November 2023.
 - ii. Who should bear costs of the application?
10. The principles guiding the grant of a stay of execution pending appeal are settled. Order 42 rule 6 of the *Civil Procedure Rules* provides that;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

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11. The Court of Appeal in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR as affirmed recently by the same Court in *Mwaura v Ethics and Anti-Corruption Commission & another* [2024] KECA 307 (KLR) (Ruling) outlined at length what ought to be considered in granting a stay of execution. The Court held that;

“each case must be determined on its own facts and circumstances; that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous; and that whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”

12. I have perused the lower court’s judgement and note that the trial court ordered that the transfer of the suit property to the 1st Defendant (herein 1st Appellant/Applicant) and subsequent subdivision and sale to third parties was illegal and should be cancelled and reverted to the estate of the late Martin Kamau. The Appellants/Applicants in their Memorandum of Appeal set out seven grounds of Appeal to wit: that the trial court erred in finding that the 1st Respondent was a wife to the late Martin Kamau and that the transfer was illegal for lack of spousal consent and that no fraud had been proved against her. The Appellants/Applicants have argued that the suit property was sold off to third parties who reside thereon and if the trial court’s orders are not stayed, they would suffer substantial loss and damage; and are willing to pay security of costs if so ordered.
13. Whereas, the Respondents argument that they should be allowed to enjoy the fruits of their judgement is valid, I find that the Applicants have satisfied the principles applicable in an application of this nature.
14. I therefore make the following orders:
- i. That there be stay of execution of the judgement issued on 9th November 2023 pending the hearing and determination of the Appeal on condition that the Appellants deposit Kshs. 500,000/= in a joint interest account in the names of counsel for the Appellants and for the Respondents within forty five (45) days from the date of this ruling. In default the stay of execution orders shall lapse automatically.



ii. That costs of this Application do abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 25TH DAY OF APRIL 2024.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

N/A for the Appellants.

Mr. Nabende for the Respondents.

Court Assistant – Mutisya.

