



IN THE COURT OF APPEAL

AT NYERI

(CORAM: KOOME, M'INOTI & MURGOR, J.J.A.)

CIVIL APPLICATION NO. NYR E005 OF 2021

BETWEEN

ELIJAH KIMANI KIMUYU.....1ST APPLICANT

PETER NDEGWA MACHARIA.....2ND APPLICANT

STANLEY THUO.....3RD APPLICANT

AND

FRANCIS MBURU KAMAU.....RESPONDENT

*(Application for stay of execution pending the hearing and determination*

*of an appeal against the judgment and decree of the Environment and Land*

*Court of Kenya at Murang'a (Kimei, J.) dated 30th April 2019 in ELCC No. 421 of 2017)*

\*\*\*\*\*

RULING OF THE COURT

*The respondent, Francis Mburu Kamau, sued the applicants in the Environment and Land Court at Murang'a for trespass and prayed for, among others, an order for their eviction from LR No Mitubiri/Wempa/Block 2/2411 and general damages. By a judgment dated 30th April 2019 Kimei, J. entered judgment in favour of the respondent, granted the order of eviction and awarded him Kshs 100,000 as general damages for trespass.*

On 3rd October 2019 the applicants applied in the trial court for stay of execution of the judgment and by a ruling dated 16th January 2020, the trial court granted them a conditional stay of execution. The conditions were that within 60 days from the date of the ruling, the applicants must file their appeal and deposit security for costs of Kshs 500,000 in a joint interest earning account in the name of the parties' advocates. In the event of failure to comply with the conditions, the motion for stay of execution was to stand dismissed.

The 60 days expired without the applicants complying with the second condition. On 12th October 2020 the respondent applied for execution of the decree and by a ruling dated 28th January 2021, the trial court noted that the applicants had not complied with the condition on security for costs and as a result the application for stay of execution stood dismissed. The court therefore allowed execution of the decree to proceed.

In the motion on notice now before us, the applicants seek an order of stay of execution of the judgment dated 30th April 2019 as well as the ruling dated 28th January 2021, pending the hearing and determination of their appeal. The application is based on the grounds that the applicants have already filed the appeal and that there is a risk that the respondent will evict them from the suit premises where they live, rendering the appeal nugatory if it succeeds. In their written submissions the applicants rehashed the above grounds but did not address the principles that guide this Court in applications for stay of execution, instead choosing to dwell, irrelevantly, on **Order 42 rule 6** of the **Civil Procedure Rules** which applies to applications for stay of execution before the trial court.

The respondent opposed the application vide an affidavit sworn on 9th March 2021 as well as their written submission. They contended that the trial court had already granted the applicants a conditional stay of execution but they refused to honour the conditions upon which the stay was granted and as a result it lapsed. They also added that the application is academic as the decree has already been executed.

We have anxiously considered the application. The assertion by the respondent that the decree has already been executed is not controverted, meaning that the application for stay of execution has been overtaken by events. In any event, we still could not have granted this application for two reasons. The applicants were obliged to demonstrate that their intended appeal is arguable and that unless we grant the order of stay of execution, the appeal will be rendered nugatory if it succeeds (See **Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR**

While we are prepared to state from the memorandum of appeal the appeal is not frivolous, the applicants have not demonstrated how the appeal will be rendered nugatory. They have not adverted to any inability on the respondent's part to re-transfer the suit property or to compensate them should the appeal succeed. Secondly, the trial court had already granted the applicants a conditional stay, which they allowed to lapse by their failure to comply with one of the conditions. In these circumstances and granted their conduct, the applicants cannot be entitled to an equitable remedy like an order for stay of execution. (See **Titus Gicharu Mwangi v. Mary Nyambura Murima & Another CA. No. Nai. 162 of 2013**).

Ultimately, we do not find any merit in this application and the same is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MARCH, 2021.**

**M. K. KOOME**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**