



**Kanyaga v Kinyanjui (Environment and Land Appeal  
13 of 2023) [2024] KEELC 3331 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3331 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 13 OF 2023**

**JM MUTUNGI, J**

**APRIL 24, 2024**

**BETWEEN**

**CHARLES GATU KANYAGA ..... APPELLANT**

**AND**

**CONSOLATA NYAWIRA KINYANJUI ..... RESPONDENT**

**RULING**

1. This Ruling is in respect of the Applicant’s Notice of Motion dated 25<sup>th</sup> September 2023, seeking for orders:
  1. Spent
  2. Spent
  3. That the Honourable Court be pleased to issue orders of stay of execution of the judgment and the subsequent decree in Wang’uru ELC No. E003 of 2020 given on 21<sup>st</sup> August, 2023 pending the hearing and determination of this application.
  4. That the Honourable Court be pleased to issue orders of stay of execution of the judgment and the subsequent decree in Wang’uru ELC No. E003 of 2020 given on 21<sup>st</sup> August 2023 pending the hearing and determination of this Appeal.
  5. That the Honourable Court be pleased to call the lower Court file in Wang’urru ELC No. E003 of 2020 to this Court for purpose of the Appeal.
  6. That the costs of this Application be provided for.
2. The motion is predicated upon the annexed affidavit of Charles Gatu Kanyaga who avers that he is aggrieved by the decision of the lower Court at Wang’uru ELC No. E003 of 2020 which was entered on 21.08.2023 and has since lodged an appeal challenging the judgment and the decree. He claims that



the Respondent has been sending goons in the suit land to intimidate and threaten him. He further avers that the judgment stands the risk of being executed and if these orders were not granted, the Applicant will be evicted from his home which he had occupied since 1975. The Applicant states that the intended Appeal has high chances of success and it will be rendered nugatory unless an order for stay of execution and/or an order for maintenance and observance of status quo is granted pending the determination of the appeal.

3. The application is opposed by the Respondent through a Replying Affidavit dated 5<sup>th</sup> October, 2023. The Respondent avers that the Applicant ought not to be granted the stay orders because she (the Respondent) is the owner of the suit land, having been declared as such by the Court in Kerugoya ELC No. 194 of 2016. The Respondent states that the Applicant has been trespassing in the suit land and has denied her access to her land since she purchased it from him and despite there being temporary orders issued by the lower Court in Kerugoya ELC E003 of 2020 restraining the Applicant from being in the land. The Respondent further avers that the Applicant has filed another case in the Chief Magistrate's Court at Wang'uru seeking the same orders. She claims that the Applicant's Memorandum of Appeal has not raised any justifiable and/or reasonable ground of Appeal and thus the Applicant should not be granted the stay orders.
4. The parties canvassed the application by way of written submissions. I have considered the application, the affidavit in support and the Replying Affidavit in opposition and I have considered the submissions by the parties together with case law cited by both counsel for the parties. The singular issue for determination in this matter is whether the Applicant has made out a case to justify the grant of stay of execution of the Ex-parte judgment delivered on 25.01.2023.
5. The principles guiding the grant of a stay of execution pending appeal are well settled. Order 42 Rule 6(2) of the [Civil Procedures Rules](#) provides as follows:
  - “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.
6. Further to the above, stay may also be granted for sufficient cause and in regards to that, Courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions with the objective of doing justice in the matter and/or the parties.
7. Section 1A(2) of the [Civil Procedure Act](#) provides that “the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective” while under section 1B the objective is to facilitate; “the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.”
8. An Applicant in application for stay of execution to succeed in such an application needs to demonstrate; firstly, that he is likely to suffer substantial loss unless the order for stay is granted; secondly, the application for stay of execution must be made without unreasonable delay; and thirdly



the Applicant is required to satisfy such order for security as the Court may order for the due performance of the decree or order that may ultimately be binding on him.

9. As to what substantial loss is, the Court in the Case of [\*James Wangalwa & Another v Agnes Naliaka Cheseto\*](#) [2012] eKLR, stated as follows:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the [\*CPR\*](#). This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. In order for an application for stay of execution of a decree or order pending appeal to succeed, the Applicant must satisfy the conditions set out in Order 42 Rule 6(2). This conditions are: (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See [\*Antoine Ndiaye v African Virtual University\*](#) [2015] eKLR.

11. In the instant case, the Applicant avers that the decree appealed against is one for his eviction from the suit land. He claims that if he is evicted, he stands to suffer substantial loss as he does not have any other place to reside. He further asserts that the application was brought without unreasonable delay and that he is willing and ready to abide by the Court’s directions in regard to the issue of security.

12. On her part the Respondent has argues that she is the registered owner of the suit land, and that she is the one who stand to suffer substantial loss and as such an order of stay of execution should not be granted. She argues that the Applicant has not provided security and as such, prays and urges the Court to decline to grant the stay of execution.

13. The Court, in [\*RWW v EKW\*](#) [2019] eKLR, considered the purpose of a stay of execution order pending appeal, and held as follows:

“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. 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.”

14. In [\*Absalom Dova vs. Tarbo Transporters\*](#) [2013] eKLR, the Court of Appeal stated that: -

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition



that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation...”

15. In this case, it is my considered view that if this Court were to grant the Applicant the order for stay of execution, it would place the Respondent at a more disadvantaged position than the Applicant. This is because the Lower Court decreed that the Respondent is the lawfully registered owner of the suit property and ordered the Applicant to vacate from the suit land. The Applicant in the suit before the Lower Court (CM ELC No. E003 of 2020) on 28<sup>th</sup> September 2020 was restrained by an order of injunction in following terms:-
  1. That an injunction be and is hereby issued restraining the Defendant, his agents, employees and/or servants or anyone claiming under him from trespassing onto, taking possession of or remaining on, interfering with and/or dealing in any way with the Plaintiff's property being title No. Kiine/Rukanga/4895 pending the hearing and determination of this suit.
  2. That the OCS Sagana or Kiamichiri Police Station does ensure there is compliance with the orders of this Honourable Court.
16. The Appellant/Applicant was jailed for contempt of Court on 3/5/2021 for a period of 21 days for disobedience of the Court order. The Applicant's application to vary the terms of the order was declined though the Applicant was granted leave to defend the suit before the Lower Court.
17. The implication therefore is that, if, the Appellant/Applicant is still in possession and/or occupation of the suit land, it is in defiance of a valid Court order and this Court naturally would not aid the Applicant to continue to disobey and defy a Court order. It is noteworthy that the Respondent in her Replying Affidavit annexed a copy of the order issued by Hon. Justice Olao on 6<sup>th</sup> December 2016 in Kerugoya, ELC No. 194 of 2016 (OS) where the Applicant was the Respondent (Defendant) and the Respondent was the Applicant (Plaintiff). The Court in the matter ordered as follows:-
  1. That Charles Gatu Kanyaga be compelled to transfer title Number Kiine/Rukanga/4895 to Consolata Nyawira Ngugi by executing the transfer and LCB Forms and obtaining the LCB Consent to transfer.
  2. That upon failure by Charles Gatu Kanyaga to execute the transfer and LCB Forms in favour of Consolata Nyawira Ngugi then the Deputy Registrar does execute the same on his behalf.
  3. That the relevant Land Control Board (Kandongu) does issue the consent to transfer in favour of Consolata Nyawira Ngugi and the Lands Registrar Kerugoya does effect registration of the transfer in favour of Consolata Nyawira Ngugi upon payment of the requisite stamp duty and registration costs.
  4. That costs be borne by the Respondent.
18. It thus clear and evident, having regard to the foregoing that the suit property was ordered to be transferred to the Respondent by the Court and there is no evidence that such order was ever challenged on appeal and/or varied. The ownership of the suit land by the Respondent was bestowed by the Court and in the absence of any variation and/or setting aside of the order vesting the property on the Respondent, I am not able to hold that the Appellant's appeal stands high chances of success as the Appellant claims.



19. In the circumstances, it does appear the Appellant had not made full disclosure of all the relevant facts as regards the suit property. Having considered all the facts and the attendant circumstances I am not persuaded that I should exercise my discretion to grant the application for stay in favour of the Applicant. The application lacks any merit and is dismissed with costs to the Respondent.

20. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA VIDEO LINK THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

