



**Kasuve v Wambua (Environment and Land Appeal E031 of 2023)
[2024] KEELC 3403 (KLR) (22 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3403 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E031 OF 2023**

**A NYUKURI, J
APRIL 22, 2024**

BETWEEN

TITUS MUTUKU KASUVE APPELLANT

AND

LEONARD MACKENZIE WAMBUA RESPONDENT

RULING

1. *vide* an application dated 26th March 2024, the appellant sought against the respondent, the following orders;
 - a. Spent
 - b. Spent
 - c. That there be stay of execution of the judgment and decree of the Hon. E. K. Suter Principal Magistrate dated and delivered on 18th October 2023 in Mavoko ELCC No. E039 of 2022 between the parties pending the hearing and determination of the appeal herein.
 - d. The costs of the application to abide the appeal
2. The application is anchored on grounds on its face as well as the supporting affidavit sworn on 26th March 2023 by the appellant. He deposed that *vide* the judgment delivered in the lower court, he was ordered to vacate the suit property in 90 days or face eviction. That his application for stay pending appeal in the lower court was declined. That the respondent has already filed application dated 23rd January 2024 seeking his eviction, when the respondent had conceded during hearing that he is in occupation of the suit property which he has occupied since 1990. Further that unless the orders sought are granted the respondent will evict him from the suit property occasioning him irreparable harm, loss and damage.



3. He maintained that prior to filing suit, the respondent had attempted selling the suit property as demonstrated in the respondent's testimony, hence there is real danger that he will dispose the suit property before the appeal is heard. He argued that the status quo should be maintained pending determination of the appeal so that the appeal is not rendered nugatory or for the character of the suit property to be irreversibly altered. He attached a copy of the judgment; memorandum of appeal; application dated 11th January 2024 and the one dated 23rd January 2024.
4. The application was opposed. Leonard Mackenzie Wambua, the respondent in this case, swore a replying affidavit dated 8th April 2024. He stated that the appellant had no right of audience before court as he had refused to obey court orders of the trial court dated 18th October 2023 having denied the respondent entry on the suit property and also having refused to vacate the suit property in 90 days as ordered by the trial court. That the applicant should first vacate the suit property before being heard.
5. He further stated that he has the right to enjoy the fruits of the judgment. It was his position that the suit property is registered in his name and that the applicant has no document to lay claim on it. He further contended that the applicant will not suffer any prejudice if the orders sought are declined as there are no structures on the suit property as the land is vacant. That the appellant has no home on the suit property which is vacant. He denied conceding to the allegation that the appellant was in occupation as it is the respondent who had been in occupation since 1991 till 2021 when the appellant unlawfully entered the suit property but the court pronounced itself on that matter *vide* its ruling of 18th July 2022. He attached a copy of certificate of lease; photographs of the suit property; application dated 26th May 2022 and order of 18th July 2022.
6. In a rejoinder, the applicant filed a supplementary affidavit dated 22nd April 2024. He averred that the trial court granted him 30 days stay of execution of the judgment from 21st March 2024. He maintained that he was in actual possession of the suit premises and it is the respondent who seeks to evict him. Further that an order of eviction is irreversible and will cause him irreparable harm. He attached a copy of the ruling dated 21st March 2024.

Analysis and determination

7. I have carefully considered the application and the response. The only issue that arise for determination is whether the applicant has met the conditions for grant of stay of execution pending appeal.
8. The law providing for the jurisdiction of the court to grant stay of execution pending appeal is provided in Order 42 rule 6 of the [Civil Procedure Rules](#) as follows;
 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 orders 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.
9. Therefore, in considering whether to grant or decline an application for stay pending appeal, the court ought to consider whether the applicant stands to suffer substantial loss if the orders sought are not granted. The mere fact that execution is imminent cannot therefore be the basis for grant of stay pending appeal, since execution is part and parcel of the legal processes in any proceeding meant to assist a party in whose favour a decision has been made, to realize their right to access to justice, by accessing implementation of the court's pronouncement on the rights of the parties.
10. In the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012] eKLR, the court held as follows;

No doubt, in law, the fact that the process of execution has been 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR, 867 and also in the case of *Mukuma v Abuoga* quoted above.

11. In the instant case, the basis for the application herein is that if stay is not granted there is a danger of the applicant being evicted from the suit property causing him irreparable harm as he has been in occupation of the suit property since 1990. Further, that there is a likelihood that the respondent may dispose of the suit property. On occupation, the respondent denied the applicant's allegation that he was in occupation and stated that the suit property was vacant, and went ahead to attach photographs of the suit property, a fact not challenged by the applicant. As the applicant's application is predicated on allegations that he is in occupation, which allegations have been disapproved by the respondent, the application is therefore baseless. In addition, it is on record that the trial court issued injunction orders restraining the applicant from trespassing and interfering with the suit property *vide* its orders of 15th July 2022, which the appellant has not shown to have appealed against and therefore any interference with the suit property on the part of the applicant, from the said date amounts to contempt of that order. The respondent states that the applicant has denied him access to the suit property, despite the injunction. For the above reasons, I find and hold that the applicant has not demonstrated that he stands to suffer substantial loss if the orders sought are declined.
12. In the premises, I find no merit in the notice of motion dated 26th March 2024 and the same is hereby dismissed with costs to the respondent.
13. It is so ordered

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the Presence of;



Mr. Muigai for appellant/applicant

No appearance for respondent

Court assistant – Josephine

