



Murwithania & 3 others v M’ikiara & another (Environment and Land Appeal E039 of 2023) [2024] KEELC 1733 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E039 OF 2023**

CK YANO, J

APRIL 11, 2024

BETWEEN

**MARY KATHURE MURWITHANIA 1ST APPELLANT
HARRIET KINANU GUANTAI 2ND APPELLANT
JOHN MUTUMA MURWITHANIA 3RD APPELLANT
MOSES KINOTI MURWITHANIA 4TH APPELLANT**

AND

**MOSES KIMATHI M’IKIARA 1ST RESPONDENT
JOHN MURIUKI M’IKIARA (BOTH LEGAL REPRESENTATIVE OF M’IKIARA
ATUANKURE) 2ND RESPONDENT**

RULING

1. This ruling is in respect of the notice of motion application dated 19th December, 2023. The application is brought under Order 22 Rule 22, Order 42 Rule 6, and Order 51 Rule 1 of the [Civil Procedure Rules](#) of the [Civil Procedure Rules](#), Sections 1A, 1B, 3A and 79G of the [civil Procedure Act](#) and Article 159 of the [Constitution](#). The applicants are seeking for orders-;
 1. Spent
 2. Spent
 3. That this Honourable court be pleased to issue an order of stay of the eviction of the appellants/applicants issued on 15th December, 2023 in Githongo PM ELC No. 05 of 2017 pending the hearing and determination of this appeal.



4. That this Honourable court be pleased to issue an order to extend the orders issued on 22nd June 2023 in Meru ELCL Application No. E013 of 2023 pending the hearing and determination of this appeal.
5. That the costs of this application be provided for.
2. The application is supported by the affidavit of Mary Kathure Murwithana and is premised on the grounds thereon. Briefly, the applicants aver that the trial magistrate delivered judgment and issued decree dated 14th February, 2023 in Githongo PM ELC No. 05 of 2017. That the applicants were aggrieved by the whole of the said judgment and decree and wish to appeal against the same in this court. The applicants aver that they filed an application for stay of the said judgment/decree and this court issued orders on 22nd June 2023 in Meru ELCL Appeal No. E013 of 2023. That subsequently, the applicants filed this appeal pursuant to leave granted by the court.
3. The applicants state that they prepared the record of appeal in this matter on 4th July, 2023 ready for filing, but the registry declined to accept the filing of the said record of appeal for the reason that the trial court's file Githongo PM ELC No. 05 of 2017 had not been received by this court's registry, and advised that the applicants file the said record of appeal once the said lower court file was availed to this court. That the applicants' advocate on record wrote a letter dated 11th August 2023 explaining the circumstances unfolding in this matter and the implementation of this court's orders issued on 22nd June 2023 in Meru ELCL Misc. App No. E013 of 2023. That despite the said explanation and the efforts of the applicant's advocate to ensure the appeal is filed in time, the respondent moved the trial court that issued orders of eviction of the applicants in the implementation of the decree of the trial court.
4. It is the applicant's contention that they have an arguable appeal with high chances of success and which will be rendered nugatory if this court does not intervene and issue the orders sought herein. The applicants further contend that the respondent will not suffer any prejudice in case the orders of stay are granted.
5. In the supporting affidavit the deponent has reiterated the above grounds and annexed copies of the decree dated 14th February, 2023 in Githongo PM ELC No. 05 of 2017, order issued on 22nd June 2023 in Meru ELCL Misc. App No. E013 of 2023, the memorandum of appeal and receipt for payment of Kshs. 50,000/= as ordered by the court, the record of appeal, a letter dated 11th August 2023 and application dated 7th December, 2023 and replying affidavit dated 14th December, 2023 in Githongo PM ELC No. 5 of 2017.
6. The application is opposed by the respondents through a replying affidavit sworn by John Muriuki on 17th January, 2024. It is the respondent's contention that the application lacks merit and is merely meant to prevent them from enjoyment of the fruits of the judgment in the lower court which directed the 1st applicant to be evicted from the respondents late father's estate. That the applicants filed Misc ELC application No. E013 of 2023 before this court seeking for orders among others, stay of execution of the decree of the lower court and leave to appeal out of time. That on 31st May 2023, the court granted the applicants orders among others, to file and serve the appeal within 7 days and stay of execution for 6 months. Relying on information from their advocates on record, the 2nd respondent states that the applicants have 7 months down the line, not complied with the aforesaid order directing them to file and serve the appeal within 7 days.
7. Again, relying on advice by their advocates on record, the respondents aver that the application must fail on inter alia, the grounds that the same is res-judicata in light of the stay orders granted on 31st May



- 2023 in Misc ELC App No. E013 of 2023, that the appeal is incurably defective and incompetent due to late filing and non-service, that the orders of 31st May, 2023 sought to be extended do not exist as they lapsed by effluxion of time on or around 1st December, 2023, and that the impugned orders of 15th December, 2023 granted by the lower court were not for eviction, but for provision of police security to implement the decree of the lower court.
8. The respondents aver that they stand to suffer prejudice if the motion is allowed as among others they are being disinherited from a portion of their late father's estate being occupied by the 1st applicant. The respondents urged the court to find that the application is devoid of merit and dismiss the same with costs.
 9. The application was canvassed by way of written submissions. The applicants filed their submissions dated 5th February, 2024 through the firm of Maitai Rimita & Co. Advocates while the respondents filed theirs dated 16th February, 2024 through the firm of John Muthomi & Co. Advocates. I have read and considered the said submissions and I need not reproduce the same herein.
 10. I have considered the application, the response and the rival submissions as well as the authorities cited by the advocates for the parties. The issues for determination in my view are-;
 - i. Whether the application is re-judicata
 - ii. Whether order of stay pending appeal should be granted or not.
 - iii. Who should pay the costs of the application.
 11. The respondents have submitted that the application is re-judicata in view of the orders issued by this court on 31st May, 2023 in Misc ELC App no. E013 of 2023. I have perused the said orders. In their application dated 23rd March 2023 in Meru ELC Misc App No. E013 of 2023 the applicants herein sought inter alia, for stay of execution of the orders issued by the lower court on 2nd December, 2022 pending the hearing and determination of the said application and intended appeal, and leave to lodge an appeal out of time. On 31st May 2023, the court granted the applicants leave to file and serve the appeal within 7 days as well as an order of stay of execution for six months pending the determination of the appeal. The applicants were also ordered to deposit in court security for costs of Kshs. 50,000/=.
 12. The record shows that the applicants herein filed their memorandum of appeal on 6th June 2023 and paid the security of Kshs. 50,000/= on 7th June 2023. It is clear therefore that the applicants complied with the directions of the court issued on 31st May 2023 by filing the appeal and depositing the security within the time frame granted by the court. Whereas the court granted stay of execution for 6 months pending the determination of the appeal, which period has since lapsed, the appeal is yet to be heard and determined. Among the prayers sought by the applicants in the instant application is an order to extend the orders granted by the court on 31st May 2023 and issued on 22nd June 2023. Whereas the prayer for stay may be said to be res judicata, in my view, the applicants are within their right to apply for extension of the orders granted by the court on 21st May 2023 and issued on 22nd June 2023 since the appeal is yet to be heard and determined.
 13. Further in their application dated 23rd March 2023, the applicants sought stay of the orders issued by the lower court on 2nd December, 2022 while in the current application, they are seeking stay of the eviction orders issued on 15th December, 2023. In view of this, I am not persuaded that the application is res judicata since the stay orders sought relate to different orders issued by the lower court on different dates.



14. The next issue is whether the order of stay sought should be granted. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary, but the discretion must be exercised judiciously and upon defined principles of law, and not capriciously or whimsically. Stay of execution can only be granted where sufficient cause has been shown by the applicant. The pre-requisites provided under Order 42 Rule 6 are firstly that the application must be brought without undue delay, secondly, court will satisfy itself that substantial loss may result to the applicant unless stay is granted, and thirdly 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.
15. From the record, the order of eviction was issued on 15th December, 2023 while the application herein was filed on 19th December, 2023. This was after a period of four days. The application no doubt was filed timeously.
16. Regarding the second pre-requisite in Order 42 Rule 6, which is substantial loss accruing to the applicants, it is not disputed that eviction orders have been issued and may be implemented anytime. I am satisfied that unless the order of stay is granted, the applicants may be evicted and which action no doubt will result in substantial loss and may render the appeal nugatory.
17. On security, I note that the applicants have already deposited a sum of Kshs. 50,000/= on 7th June 2023 as directed by the court. Therefore, I will not make any order for further security as the security already deposited is sufficient in the circumstance. Therefore, the court finds merit in the application dated 19th December 2023 and allows the same in terms of prayers 3 and 4 thereof.
18. Costs of the application to abide the outcome of the appeal.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF APRIL 2024.

IN THE PRESENCE OF

Court Assistant – Tupet

John Muthomi for respondents

Ms Mugo holding brief for Rimita for appellant

C.K YANO

JUDGE

