



**Wambeti v Keritu alias Gichovi Kiritu (Environment and Land Appeal  
E023 of 2023) [2024] KEELC 4477 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4477 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E023 OF 2023**

**A KANIARU, J**

**MAY 22, 2024**

**BETWEEN**

**PURITY WAMBETI ..... APPLICANT**

**AND**

**CRISPIN GICHOVI KERITU ALIAS GICHOVI KIRITU ..... RESPONDENT**

**RULING**

1. I am called upon to determine a Notice of Motion dated 15.11.2023 and filed on 17.11.2023 under Certificate of Urgency. It is expressed to be brought under Order 42 rule 6 of the [Civil Procedure Rules](#) 2010, Section 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law. The applicant - Purity Wambeti – is the appellant. She was the defendant in the lower court case whereas the respondent – Crispin Gichovi Keritu alias Gichovi Kiritu - was the plaintiff. The application is essentially one for stay of execution pending appeal and the prayers sought are as follows:
  1. Spent
  2. Spent
  3. That pending the hearing and determination of the appeal herein there be a stay of execution of the decree issued by the Senior Resident Magistrate Embu court on the 12<sup>th</sup> October 2023 in ELC case no. 81 of 2019 and all consequential orders.
  4. That costs be in the cause.
2. The motion is predicated on the grounds on the face of it and further on the Supporting Affidavit sworn by the Applicant. The applicant deposed that the respondent filed the suit herein against her before the Embu law courts, the same being ELC 81 of 2019, claiming that she trespassed on his land parcel no. Gaturi/Githimu/4517. That the suit was heard before the honourable court and judgement



delivered on the 12.10.2023. She was aggrieved as the court ordered for demolition of part of her rental houses and also that she pays mesne profits to the respondent. It also ordered her to pay costs and interest of the case. That is why she has filed the appeal in her view herein which appeal has high chances of success.

3. She averred that unless stay of execution is granted she stands to suffer substantial loss if the decree of the trial court is implemented as her rental houses will be demolished. That unless stay of execution is granted, the appeal shall be rendered nugatory. That the interest of justice demands that all issues be determined to the satisfaction of the parties. That she has made the application without unreasonable delay and she prays that the same be allowed.
4. The application was opposed by the respondent, Chrispin Gichovi Keritu, via replying affidavit sworn on 27.11.2023. He deposed that the matter before the lower court proceeded on merit and that the trial magistrate arrived at a just decision based on the evidence adduced. That during trial, the applicant did admit that her developments had encroached on his parcel of land and in the circumstances the applicants appeal does not have a great chance of success. That he is the one who has suffered and continues to suffer loss due to the encroachment on his land by the appellant.
5. That he would not be opposed to a stay of the order of demolition of the appellant's developments that have encroached on his land so that the appeal can be heard. That the same would however be conditional upon the applicant depositing the decretal sum of Kshs. 547,200 in court as security. That additionally the applicant should further be ordered to deposit in court Kshs. 12,000 per month being the monthly rent arrived at by the trial court, and also the amount proposed by the defendant during trial, for the 8 rooms that have encroached on his parcel of land. He urges that the application be dismissed with costs.
6. It was agreed that the application be disposed by way of written submissions. The applicants submissions were filed on 09.01.2024 whereas the respondent's submissions were filed 02.02.2024.
7. The applicant submitted that she has based her application on the provisions of order 42 rule 6 of the *Civil Procedure Rules*. That from the said provisions, an appeal is not an automatic stay of execution and a party requiring stay must move the court for an order of stay. That the said provisions also grant an appellate court jurisdiction to handle applications for stay of execution whether they had been filed at the lower court or not. That the applicant has shown sufficient cause for this court to stay execution of the decree herein and that the appeal will be rendered nugatory if the decree is implemented.
8. That the application was made without unreasonable delay as judgment was delivered on 12.10.2023 and within one month this application was made. That the applicant will also be ready to deposit any security for the due performance of the decree as this court may impose. That the amount of money that the respondents has requested for security is excessively high. That she did not admit to having encroached on the respondent's land and therefore that averment is misleading. Ultimately it is urged that the application be allowed with costs.
9. The respondent on the other hand submitted that it is clear that what the applicant is seeking is to stay demolition of the rental houses. That however she is silent on the issue of special damages, mesne profits and costs of the suit that she was ordered to pay. That the applicant should have demonstrated good faith by paying the respondent the aforesaid amounts of money as ordered by the court. That she has not taken any steps to do so. That the applicant has not demonstrated that she stands to suffer substantial loss in the event that the orders she seeks are not granted.
10. That on the other hand, in the event that the prayers sought by the applicant are granted, the respondent who is entitled to enjoy the fruits of his judgement will be greatly prejudiced since the



applicant will continue to enjoy the rent from the suit premises yet it has already been determined that the said premises are encroaching on the respondents parcel of land. The case of *Nyatera v Nyakundi (Civil Appeal E033 of 2022)*(2023) KEHC 3086 (KLR) (16 March 2023)(Ruling) citing the case of *Samvir Trustee Ltd v Guardian Bank Ltd* Nairobi (Milimani) HCCC 795 of 1997 was cited in support of the submissions.

11. I have considered the application, the response made to it, and the rival submissions. The issue for determination is whether the applicant is entitled to an order of stay of execution pending appeal.
12. The relevant law governing applications for stay of execution pending appeal is Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides 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 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.
13. The power to grant stay of execution is a discretionary one and the court of appeal in the case of *Butt -vs- Rent Restriction Tribunal* (1982) KLR 417 as cited in *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKLR gave guidance on how a court should exercise the said discretion. It observed thus:
  - “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge’s discretion.



3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
  5. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
14. The purpose of an order for stay of execution pending appeal is to preserve the subject matter of the appeal. See the case of *RWW vs EKW* (2019) eKLR where it was held:
- “.....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.”
15. The important question to ask is whether the applicant has satisfied the requirements for grant of stay of execution. She has to satisfy the court that substantial loss may result to her unless the stay is granted. She also needs to show that the application has been made without undue delay and that she has given security or is ready to give security for due performance of the decree.
  16. The judgement that is the subject of the appeal herein was delivered on 12.10.2023 whereas the application for stay was filed on 17.11.2023. This translates to a period of about a month and a few days, which to me is within reasonable time.
  17. On the issue of substantial loss, the applicant has stated that should the court not issue orders for stay of execution, the refusal has the consequence of the decree being implemented, which means demolition of her rental houses. That there will be no need for the appeal if the houses she has built are demolished. This is in my view is a demonstration of substantial loss.
  18. The applicant has also expressed that she is willing provide security for the performance of the decree as directed by the court. The respondent on the other hand proposed that the applicant deposits the decretal sum of Kshs. 547,200 as security and that she should also be ordered to deposit Kshs. 12,000 per month being the monthly rent arrived at by the trial court. However, it has been held that the courts, in fashioning the security, is not necessarily bound by what is offered by the parties. I also agree with the applicant that the respondent’s proposal is on the higher side. This court therefore directs that the applicant do deposit the sum of Kshs. 50,000 in court as security for the performance of the decree within the next 21 days of this ruling.
  19. The upshot of the above is that the notice of motion application dated 15.11.2023 is allowed in terms of prayer no. (3).
  20. Costs to be in the cause.



**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 22ND DAY OF MAY, 2024.**

In the presence of Applicant and the respondent.

Court Assistant - Leadys

**A. KANIARU**

**JUDGE – ELC, EMBU**

