



**Mbau v Gitice (Environment and Land Appeal 42 of 2023)
[2024] KEELC 3860 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 42 OF 2023**

YM ANGIMA, J

MAY 16, 2024

BETWEEN

LAWRENCE WACHIRA MBAU APPELLANT

AND

SAMUEL MBAU GITICE RESPONDENT

RULING

1. Vide a notice of motion dated 17.11.2023 expressed to be based upon Order 42 rule 6 of the [Civil Procedure Rules, 2010](#) (the Rules) and Sections 1A, 1B & 3A of the [Civil Procedure Act](#) (Cap.21) the Respondent sought a stay of execution of the judgment and decree of this court dated 02.11.2023 and all consequential orders pending the hearing and determination of his intended appeal to the Court of Appeal.
2. The application was based on the grounds set out on the face of the motion and contents of the supporting affidavit sworn by the Respondent on 02.11.2023. The Respondent contended that unless a stay of execution was granted he stood the risk of being evicted from the suit property on which he had settled for years. He contended that his intended appeal to the Court of Appeal might be rendered nugatory unless the stay sought was granted.
3. The Appellant filed a replying affidavit sworn on 19.01.2024 in opposition to the application. It was contended that the Respondent had not demonstrated what substantial loss he might suffer in the absence of a stay; that the application had not been filed without unreasonable delay; and that the Respondent had not provided any security for due performance of the decree should his intended appeal ultimately fail. The court was consequently urged to dismiss the application with costs.
4. The court has considered the Respondent's said application, the Appellant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question



for determination is whether or not the Respondent has satisfied the principles for the grant of a stay of execution pending appeal as required by law.

5. Order 42 rule 6(2) of the Rules on stay of execution stipulates as follows:

“No order for stay of execution shall be made under sub-rule (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. There is no doubt from the material on record that the Respondent has been in possession and occupation of the suit property for some years. The material on record shows that he has been residing upon and cultivating the suit property over the years. In the premises, if he is evicted from the suit property before his intended appeal to the Court of Appeal is heard and determined he is likely to suffer substantial loss within the meaning of Order 42 rule 6(2) of the Rules.

7. The court has considered the Appellant’s contention that the application was not filed without unreasonable delay. The material on record shows that this court delivered the impugned judgment on 02.11.2023 whereas the application for stay was filed on 24.11.2023, barely 3 weeks later. The court is of the view that such delay cannot be considered to constitute undue delay. The material on record shows that the Appellant himself had filed an application dated 08.11.2021 for stay pending appeal which was filed about one month after the judgment of the subordinate court. Vide its ruling dated 19.05.2022 this court held that the delay of one month was not unreasonable.

8. On the issue of security for due performance of the decree, the court is of the opinion that such security would not be necessary in view of the nature of the dispute between the parties. There should be no difficulty in restoring the Appellant’s registration as proprietor of the suit property and evicting the Respondent should his intended appeal to the Court of Appeal ultimately fail. Perhaps the only safeguard which the Appellant may require is preservation of the suit property so that it is not leased, charged or alienated during the pendency of the intended appeal. As a result, the court is inclined to issue an order of inhibition to prevent any dealings with the suit property until the determination of the Respondent’s intended appeal.

9. The upshot of the foregoing is that the court finds merit in the Respondent’s notice of motion dated 17.11.2023 seeking stay of execution. As a consequence, the court makes the following orders for disposal thereof:

- a. The Respondent is hereby granted a stay of execution of the judgment and decree of this court dated 02.11.2023 together with all consequential orders for a period of two (2) years from the date hereof or until the determination of his intended appeal, whichever comes first.
- b. An order of inhibition be and is hereby made under Section 68 of the Land Registration Act, 2012 to prevent any dealings with Title No. Subukia/Subukia Block 9/4 (Chinga) pending the hearing and determination of the Respondent’s intended appeal to the Court of Appeal, or until further orders of the court.
- c. Each party shall bear his own costs of the application.

Orders accordingly.



RULING DATED AND SIGNED AT NYANDARUA THIS 16TH DAY OF MAY, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

N/A for the Appellant

Ms. Awour for the Respondent

C/A - Carol

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Y. M. ANGIMA

JUDGE

