



**Mwangi v Charagu & another (Environment & Land Case
39 of 2018) [2024] KEELC 3669 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3669 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 39 OF 2018**

JO OLOLA, J

MAY 9, 2024

BETWEEN

JANE NYAWIRA MWANGI APPLICANT

AND

MWANGI CHARAGU 1ST RESPONDENT

EVA WANJA MWANGI 2ND RESPONDENT

RULING

1. By the Notice of Motion dated 29th May 2023, Jane Nyawira Mwangi (the Plaintiff) prays for an order that there be a stay of execution of the decree herein pending the hearing and determination of Civil Appeal No. 31 of 2023.
2. The Application is supported by a brief Affidavit sworn by the Plaintiff wherein she deposes as follows at Paragraphs 2 to 8 thereof as follows:
 2. That Judgment in this case was delivered on 9th December, 2022;
 3. That I was dissatisfied with the Judgment and lodged an appeal at the Court of Appeal being Nyeri Civil Appeal No. 31 of 2023 (Annexed herewith and marked “J 1” is a copy of the Memorandum of Appeal);
 4. That the said appeal is arguable and has a likelihood of success;
 5. That delay in filing this Application has been caused by my Advocate on record who failed to update on the progress herein or the requisite steps to take;
 6. That the Respondents are in the process of executing the decree herein and I have been served with a notice to show cause;



7. That if the decree is executed, I stand to incur a substantial loss which I may not recover if my appeal is successful; and
8. That I am willing to give security as the Court may deem fit for the performance of the decree.
3. Mwangi Charagu and Eva Wanja Mwangi (the 1st and 2nd Defendants) are opposed to the Application. In a Replying Affidavit sworn on their behalf by the 1st Defendant, the two Defendants aver that there is no decree capable of being stayed from execution as the Judgment merely dismissed the Plaintiff's Originating Summons.
4. The Defendants assert that the Plaintiff is only trying to stop the recovery of Party and Party costs which have since been taxed at Kshs.180,685/-. They further aver that execution is a natural process in any case which does not merit an order of stay.
5. The Defendants further assert that the Plaintiff has not demonstrated the substantial loss she is likely to suffer and that in any event the Application has been filed more than 5 months after the Judgment.
6. I have carefully perused and considered the Plaintiff's Application as well as the response thereto by the Defendants. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties herein.
7. By her Application before the Court, the Plaintiff urges the Court to stay the execution of the decree arising from the Judgment of this Court as delivered on 9th December 2022 pending the hearing and determination of the Appeal that she has filed before the Court of Appeal.
8. In regard to an order of stay pending appeal, Order 42 Rule 6(2) of the *Civil Procedure Rules* provides as follows:
 - “(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. In the matter before me, the Plaintiff asserts that she has lodged an Appeal in the Court of Appeal which is arguable and that if the decree is executed she stands to incur substantial loss which she may not be able to recover if her Appeal is successful.
10. It was not however very clear to me if indeed the Plaintiff has a proper Appeal that is pending. I state so because while the rules require that a Notice of Appeal be lodged within 14 days of Judgment, the Memorandum of Appeal attached to the Plaintiff's Supporting Affidavit is dated 22nd February, 2023 which would mean it was filed almost two months after the Judgment was rendered on 9th December, 2022.
11. Explaining the six (6) months delay in bringing this Application, the Plaintiff attributes the same to her Advocate previously on record who failed to update her on the progress herein or the requisite steps to take. While that may be excusable, I was unable to find any purpose for an order of stay of execution in the circumstances of this case even if the plaintiff can be assumed to have lodged a proper Appeal.



12. As it were, the Plaintiff had by the Originating Summons herein dated 2nd August, 2018 sought a declaration that the 1st Defendant herein held the parcel of land known as L.R No. Konyu/Baricho/456 in trust for herself and that the subsequent transfer to the 2nd Defendant was equally subject to the customary trust. As a consequence, she urged the Court to determine the trust in order to have the suit land shared equally.
13. In the Court's Judgment rendered on 9th December, 2022 aforesaid, this Court did not find any evidence of the alleged trust and proceeded to dismiss the suit. That was clearly a negative order that is incapable of being stayed as there is really nothing to stay.
14. In that respect I am in agreement with the Defendants submissions that the purpose of this Application is to stop the recovery of Party and Party costs which have since been taxed herein in the sum of Kshs.180,685/-. That is in fact the position given the Plaintiff's averment at paragraph 6 of the Supporting Affidavit that the Defendants are in the process of executing the decree herein and that she has been served with a Notice of Show Cause.
15. As Gachuhi, Ag J.A (as he then was) stated in Kenya Shell Limited -vs- Kibiru (1986) KLR 410, at Page 417:

“It is not sufficient by merely stating that the sum of Shs.20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgment. What assurance can there be of the appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgment.”
16. In the circumstances herein, I am not persuaded that the Plaintiff stands to suffer any loss substantial or otherwise as the process of execution for costs is a lawful process.
17. It follows that I do not find any merits in the Motion dated 29th May, 2023. The same is hereby dismissed with costs to the Defendants.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 9TH DAY OF MAY, 2024.**

In the presence of:

Ms Mwikali for the Applicant

Mr. Wachira holding brief for L. Mwai for the Respondent

Court Assistant – Kendi

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J. O. Olola

JUDGE

