



**Gakuu & another v Macharia & 5 others (Environment and Land Appeal
E027 of 2022) [2024] KEELC 5004 (KLR) (24 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5004 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E027 OF 2022**

**JG KEMEI, J
JUNE 24, 2024**

BETWEEN

**PATRICK KARANJA GAKUU 1ST APPELLANT
SAMSON MWANGI NJOROGE 2ND APPELLANT**

AND

**JOYCE WANJIRU MACHARIA 1ST RESPONDENT
PETER MATHIU 2ND RESPONDENT
THIKA LAND REGISTRAR 3RD RESPONDENT
HON ATTORNEY GENERAL 4TH RESPONDENT
ANNEFA LIMITED 5TH RESPONDENT
JOSTEPA INVESTMENT COMPANY LIMITED 6TH RESPONDENT**

RULING

1. Before Court is the 1st Respondent/Applicant's Notice of Motion Application dated 1/2/2024 expressed under Sections 1A, 1B *Civil Procedure Act* and Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 *Civil Procedure Rules* seeking orders THAT;
 - a. Spent.
 - b. This Honorable Court be pleased to grant an order of stay of execution pending appeal on the Judgement delivered on the 15th day of November 2023 by Lady Justice J G Kemei pending the hearing and determination of the Application.



- c. This Honorable Court be pleased to grant an order of stay of execution pending appeal on the Judgement delivered on the 15th day of November 2023 by Lady Justice J G Kemei pending the hearing and determination of the intended appeal.
 - d. This Honorable Court be pleased to grant an order of status quo in respect of Ruiru/Kiu Block 2 (Githunguri) 1206 now subdivided to Ruiru Kiu Block 2 (Githunguri) 22416-22429 pending hearing and determination of this Application and appeal.
 - e. This Honorable Court be pleased to make orders that are expedient in the circumstances of this case.
 - f. Costs of the Application be provided for.
2. In the grounds and Affidavit in support of the Application, the Applicant averred that the Appellants appealed against the subordinate Court Judgment in Ruiru MCELC No. 27 of 2020 delivered on 3/3/2022 in favor of the Respondents. That this Court sitting on appeal allowed the appeal and set aside the trial Court Jdt. That the Applicants are in occupation of the suit properties and if the Appellants proceed to execute the decrees, they will suffer irreparable loss. That the Applicant is ready and willing to deposit security as Court may direct.
 3. In opposition, the 2nd Appellant Samson Mwangi Njoroge swore his Replying Affidavit on 20/2/2024. He deposed that the Applicants are not the legitimate registered owners of the Ruiru Kiu Block 2 (Githunguri) 22416-22429 being illegal subdivisions of the land parcel Ruiru/Kiu Block 2 (Githunguri) 1206. That the Appellants possess the title deed for Ruiru/Kiu Block 2 (Githunguri) 1206 in light of this Court's Judgment allowing their appeal. That they have prepared the suit land for tilling and it is untrue that the 1st Respondent is facing eviction. They urged the Court to dismiss the Application.
 4. In a rejoinder, the 1st Applicant in her Further Affidavit dated 4/4/2024 deposed that the 2nd, 5th and 6th Respondents alongside her have been in actual possession of the suit land. That the Respondent entered into the suit land and caused havoc and maliciously destroyed the beacons thereon as shown by copies of photographs annexed as 'JWM1'. That it is in the interests of justice that the Application be allowed so that her appeal is not rendered nugatory.
 5. On 21/1/2024 directions were taken and parties elected to canvass the Application by way of written submissions.
 6. The firm of Kanyi Kiruchi & Co. Advocates filed submissions dated 18/4/2024 on behalf of the Applicant whereas the Respondents submissions dated 26/4/2024 were filed by Mwangi Kigotho & Co. Advocates.
 7. The Applicants submitted that they are aggrieved with the Judgment of this Court and have preferred an appeal. That they will suffer substantial loss if the Respondents proceed to execute the Judgment in their favor. That their intended appeal is arguable as it revolves on the root of their titles. They urged the Court to allow their Application as drawn.
 8. On the other hand, the Respondents posited that the intended appeal is only meant to frustrate the Judgment as there is no evidence of request for typed proceedings for filing the substantive appeal. That the Applicants have not satisfied the preconditions in Order 42 Rule 6 of the *Civil Procedure Rules*. That the Applicants will not suffer any substantial loss because their titles were obtained fraudulently and it is only fair that that the suit land reverts to its former registration. The Court was urged to dismiss the Application with costs.



9. The main issue for determination is whether the Application is merited addressed as follows.
10. The legal provisions for stay of execution pending appeal are anchored in Order 42 Rule 6 (1) & (2) of the *Civil Procedure Rules* that:-
- “(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 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.”
11. The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an Application for stay of execution and held that: -
- “1. the power of the Court to grant or refusal an Application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is 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. (sic) (trial Court Judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
4. 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 of costs as ordered with cause the order for stay of execution to lapse”.
12. Has the Applicant satisfied the conditions set on Order 42 rule 6 (2) of the *Civil Procedure Rules* above? The Applicant contends that she is on verge of being evicted from the suit land as he Respondents are



intent on executing the Judgment in their favor. It is trite that execution on its own does not amount to substantial loss because it is a lawful process. See the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR. The Respondents averred that the allegation of an eminent eviction is not true because they are in actual possession of the suit land by tilling it. That in the event the Applicants intended appeal succeeds, the suit land will be available for the Applicant to take possession. In my view the Applicant has not demonstrated the substantial loss she stands to suffer if the order of stay is not granted.

13. On whether the Application was timeously filed, I note that the Application was filed on 1/2/2024, over two months after the delivery of the impugned Judgment. I am of the view that the same is not inordinate. Lastly the Applicant deposed that she is ready and willing to abide by terms of security if so ordered by the Court.
14. In the end and to preserve the suit property status quo be and is granted in terms of prayer No. d of the Application.
15. Costs shall abide the outcome of the intended Appeal.
16. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 24TH DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Mwangi Kigotho for Appellant

Kanyi for 1st Respondent

2nd, 3rd and 4th Respondents – Absent

Kanyi for 5th and 6th Respondents

Court Assistants – Phyllis & Oliver

