



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kinagi v Talent International Community Organization; Wanjiku
& 5 others (Interested Parties) (Environment and Land Appeal
E002 of 2024) [2024] KEELC 4793 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4793 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E002 OF 2024**

YM ANGIMA, J

JUNE 13, 2024

BETWEEN

JULIUS KIMANI KINAGI APPELLANT

AND

TALENT INTERNATIONAL COMMUNITY ORGANIZATION RESPONDENT

AND

BEATRICE WANJIKU INTERESTED PARTY

ANN GATHINJI INTERESTED PARTY

HANNAH MWIHAKI INTERESTED PARTY

JANET M. MSHIGATI INTERESTED PARTY

MONICAH WANJIRU GIATU INTERESTED PARTY

DORCAS WANJIKU THUKU INTERESTED PARTY

RULING

A. Appellant's Application

1. *Vide* a notice of motion dated 18.01.2024 expressed to be grounded upon Sections 1A, 1B & 3A of the [Civil Procedure Act](#) (Cap.21), Order 22 rule 22; Order 42 rule 6 & Order 51 rule 1 of the [Civil Procedure Rules](#), 2010 (the Rules), and any other enabling provisions of the law the Appellant and the Interested Parties (the Appellants) sought a stay of execution of the judgment and decree of the trial court dated 18.12.2023 pending the hearing and determination of the appeal.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant, Julius Kimani Kingi, on 18.01.2024 and the annexures



thereto. The Appellants contended that they were members of the Respondent and had contributed towards the purchase of Title No. Nyandarua/Kirima/4475 (the suit property) for the purpose of distribution amongst the members.

3. It was the Appellants' case that they were in actual possession and occupation of the suit property and that they would be rendered homeless if they were to be evicted in execution of the decree of the trial court during the pendency of the appeal. They contended that they have cultivated some crops and built structures on the suit property and that the appeal might be rendered nugatory in the absence of a stay. They also offered to provide security for due performance of the decree should the appeal ultimately fail.

B. Respondent's Response

4. The Respondent filed a replying affidavit sworn by its chief executive director, Karani Bin Salim, on 16.02.2024 in opposition to the application. He deposed that the Respondent was the sole registered proprietor of the suit property which was purchased for the purpose of constructing a children's home and had only allowed some members to temporarily occupy the same before funds could become available for the project. It was his case that it had filed Nyahururu CM ELC No. 292 of 2018 against some persons who were illegally occupying the suit property whereby the court ordered them to vacate. It was stated that when Julius Kimani Kinagi learnt of the said judgment to give a written undertaking dated 10.06.2021 to vacate the suit property within 3 months but he did not honour his promise thereby necessitating the filing of Nyahururu CM ELC No. 292 of 2018 – Talent International Community Organization v Julius Kimani Kinagi whereby he was ordered to vacate the suit property.
5. The Respondent contended that it was evident from the letter of undertaking dated 10.06.2021 that Julius Kimani Kinagi had no legal interest in the suit property hence he would not suffer any substantial loss in the absence of a stay. The Respondent further contended that it would be exposed to substantial loss and damage if the implementation of its project was stayed. The Respondent disputed that the Appellant's appeal shall be rendered nugatory in the absence of a stay. As a result, the court was urged to dismiss the application with costs.

C. Appellants' Reply

6. The Appellants filed a supplementary affidavit sworn by Julius Kimani Kinagi on 29.02.2024 in which he stated that he was actually the one in occupation of the suit property and that he had cultivated the land with crops. He denied having given any undertaking to vacate the suit property. He asserted that he had made a financial contribution towards its acquisition hence he had acquired a legal interest in the property. He was thus apprehensive that in the absence of a stay his crops shall be destroyed and he might be rendered destitute.

D. Directions on Submissions

7. When the matter came up for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Appellants filed submissions dated 21.03.2024 whereas the Respondent's submissions were dated 12.04.2024.

E. Issues for Determination

8. The court has perused the notice of motion dated 18.01.2024, the replying affidavit in opposition thereto, the supplementary affidavit as well as the material on record. The court is of the view that the key issues for determination herein are the following:



- a. Whether the Appellants have made out a case for the grant of a stay pending appeal.
- b. Who shall bear costs of the application.

F. Analysis and Determination

a. Whether the Appellants have made out a case for the grant of a stay pending appeal

9. The court has considered the submissions and material on record on this issue. Whereas the Appellants submitted that they had satisfied the principles for the grant of a stay of execution pending appeal, the Respondent contended otherwise. The Appellants contended that they stood to suffer substantial loss and the risk of their appeal being rendered nugatory in the event that a stay was denied.
10. The court has considered the totality of the material on record including the fact that the Respondent appears to have about 172 members. It is not clear why the Appellants would want to have preferential treatment in the occupation of the suit property. The court has noted that the Appellants have some crops and temporary structures on the suit property. The nature of the crops were not disclosed. Their maturity period was also not given. The court is thus not satisfied that the Appellants have demonstrated substantial loss within the meaning of Order 42 rule 6(2) of *the Rules*.
11. The material on record further shows that the Respondent intends to establish a children's home on the suit property. There is no indication that it intends to charge, lease, sell, transfer, alienate or deal with the suit property in such manner that it shall not be available later on should the pending appeal ultimately succeed. The court is thus not satisfied that the Appellants' appeal shall be rendered nugatory in the absence of a stay.
12. In the case of *Stanley Kangethe Kinyanjui -vs- Tony Keter & 5 Others* [2013] eKLR it was held that whether or not an appeal will be rendered nugatory depended on whether the action sought to be stayed can be reversed upon the appeal being successful or, if not, whether damages can adequately compensate the successful Appellant. The court is thus of the opinion that the Appellant can still regain possession of the suit property in the event of their appeal being successful.

b. Who shall bear costs of the application

13. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court is, however, of the view that since the main appeal is yet to be heard, then costs of the application should be costs in the appeal.

G. Conclusion and Disposal Order

14. The upshot of the foregoing is that the court finds and holds that the Appellants have failed to demonstrate a case for the grant of a stay pending appeal. As a consequence, the court makes the following orders for disposal of the application for stay:
 - a. The Appellants' notice of motion dated 18.01.2024 be and is hereby dismissed.
 - b. The costs of the application shall be costs in the appeal.
 - c. The appeal shall be mentioned on 10.07.2024 to confirm the filing of the record of appeal.

Orders accordingly.



RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 13TH DAY OF JUNE, 2024.

Y. M. ANGIMA

JUDGE

In the presence of

Mr. Peter Ojare for the Appellant and Interested Parties

Mr. Nderitu Komu for the Respondent

C/A - Carol

.....

