



**Ngari v Gichoni (Environment and Land Case 12 of 2019)  
[2024] KEELC 5140 (KLR) (13 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5140 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND CASE 12 OF 2019  
A KANIARU, J  
JUNE 13, 2024**

**BETWEEN**

**JOHN KARIUKI NGARI ..... PLAINTIFF**

**AND**

**MUGO GICHONI ..... DEFENDANT**

**RULING**

1. Before me presently for determination is a Notice of Motion dated 12.06.2023 filed in court on even date under a Certificate of Urgency. It is expressed to be brought under Order 42 Rule 6(1), (2) and (3), Order 50 Rule 1 of the *Civil Procedure Rules*. The applicant – John Kariuki Ngari – was the plaintiff in this concluded suit whereas the respondent - Mugo Gichoni - was the defendant. The prayers sought are as follows:
  1. Spent.
  2. Spent.
  3. That there be stay of execution of the decree issued on the 21<sup>st</sup> March 2023 pending the hearing and determination of an appeal no. E055 of 2023 in court of appeal Nyeri.
  4. That this honorable court do give any other or further orders as it deems fit in the circumstances in the interest of justice.
  5. That costs of this application be provided for.
2. The application is premised on the grounds that the applicant is dissatisfied with the judgement given on the 19.01.2023 by this court. That he has filed an appeal in the Court of Appeal in Nyeri, being appeal no. E055 of 2023, challenging the judgement and the appeal has an overwhelming chance of



success. That he stands to be evicted as Quickline Auctioneers have visited the suit land and informed him that they will evict him anytime. That the appeal will be rendered nugatory if the respondent is allowed to proceed with the execution process. The respondent will not suffer any prejudice as he has been in occupation of the suit land for over 12 years together with his family. He has annexed a copy of the notice of appeal and memorandum of appeal.

3. The respondent responded to the application by way of a replying affidavit sworn on 20.06.2023. He deposed that there has been inordinate delay in filing the instant application considering that the decree herein was issued on 19.01.2023 which is about six months later, and the delay has not been explained. That the application has not demonstrated factors that show the execution will create affairs that will irreparably affect the success of his appeal.
4. That the applicant has not demonstrated any substantial loss in the event of the execution of the decree being appealed against. That litigation must come to an end. That he will be extremely prejudiced if the application is allowed as he, the applicant, will continue to deny him the right to enjoy his proprietary rights over the suit property. He urges that the appeal as filed is weak and with no chance of success. He asks that the notice of motion be dismissed with costs to him.
5. The application was canvassed by way of written submissions. The applicant's submissions were filed on 19.02.2024 and he mainly reiterated the grounds in his application and supporting affidavit.
6. It is not clear when the respondent's submissions were filed but the same are dated 24.04.2024. He submitted that the conditions for grant of stay of execution are set out under order 42 rule 6 of the civil procedure rules and require that the applicant must demonstrate sufficient cause, provide security for the decretal sum and file the application timeously. That the applicant has failed in his application to demonstrate what nature of loss he will suffer once the decree is executed. That the applicant has not offered any security for costs. That also the applicant was indolent in bringing this application as he waited for six months to lapse.
7. It was submitted further that the applicant, having failed to demonstrate the conditions for grant of stay of execution, should have his application dismissed. The court was referred to the cases of *Estate of Richard Churko Stephen 'alias' Richard Churko Guyo (Deceased)* 2021 Eklr, *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Ltd & Anor (Garnishee)* 2019 Eklr citing the case of *Machira T/A Machira & Co. Advocates v East African Standard* (No. 2) (2002) 2 KLR 63, *Kenya Shell Limited v Benjamin Karuga Kibiru & Anor* (1986) Eklr among others.
8. 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 orders of stay of execution pending appeal.
9. Stay of Execution pending appeal is governed by 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.

10. The power to grant stay of execution is discretionary and in order for an applicant to succeed in an application for stay of execution, they must satisfy the court that substantial loss may result to them unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
11. The judgement that is the subject of the appeal herein was delivered on 19.01.2023 whereas the application for stay was filed on 12.06.2023. This is a period of 5 months which to me is not so inordinate to be unreasonable.
12. The applicant says that he has demonstrated that he stands to suffer substantial loss should the order of stay of execution not be granted as he will be evicted from the suit land which has been his home for over 12 years. The respondent does not deny the said occupation. The applicant's suit herein was a claim for adverse possession and one of the main ingredients to succeed in the same is actual occupation or possession of land. I agree with him that should he be evicted from the suit land he will suffer substantial loss as the appeal will be rendered nugatory. The respondent on the other hand, apart from a delay in enjoying the fruits of his judgement, stands to suffer no loss should the orders for stay be granted as he is not in occupation of the suit land. He will still be able to recover the same should the applicant's appeal fail.
13. The applicant has also filed an appeal which, in his view, raises triable issues. He has provided a memorandum of appeal which I have examined and found it raises triable issues.
14. Although the applicant has not expressed whether he is ready to offer security of costs, this court is of the opinion that the applicant can be directed by the court to do so. Therefore, this court shall exercise its discretion regarding the security for costs to be offered by the applicant.
15. The upshot of the foregoing is that I allow the notice of motion application dated 12.06.2023 in terms of prayer (3) and (4) on the following terms:
  - a. The applicant is hereby ordered to deposit in court the sum of Kenya Shillings Fifty Thousand (Kshs. 50,000) only as security for costs within 45 days from the date of this ruling failing which the order of stay lapses automatically.
  - b. Costs of the application to be in the cause.



**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 13<sup>TH</sup> DAY OF JUNE, 2024.**

In the presence of Njiru Mbogo for Mogusu for plaintiff/ applicant, Ms Muthoni Ndeke for Ndolo for defendant/ respondent.

**Court Assistant - Leadys**

**A. KANIARU**

