



**Njeru v Kinyua (Environment and Land Appeal E015 of 2023)
[2024] KEELC 5141 (KLR) (11 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5141 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E015 OF 2023**

**A KANIARU, J
JUNE 11, 2024**

BETWEEN

TERESIA WANGITHI NJERU APPLICANT

AND

FREDRICK KINYUA RESPONDENT

RULING

1. Before me for determination is a Notice of Motion application dated 28.08.2023 and filed on 19.09.2023 under a Certificate of Urgency. It is expressed to be brought under Sections 3 and 13 (7) (a) of the *Environment and Land Court Act*, Order 42 rule 6 (1) & (2) and Order 51 Rule 1& 3 of the *Civil Procedure Rules*, and all other enabling law. The applicant – Teresia Wangithi Njeru - was the 2nd defendant in the lower court and is now the appellant whereas the respondent – Fredrick Kinyua - was the plaintiff. The application is essentially one for stay of execution pending appeal and the prayers sought are as follows:
 1. Spent.
 2. Spent
 3. That pending the hearing and determination of the appeal filed herein there be a stay of the judgment delivered on 25.07.2023 in Embu Chief Magistrate Court MC ELC No 132 of 2018.
 4. That the costs of this application be provided for.
2. The application is anchored on the grounds set out on its face and on the Supporting Affidavit sworn by the applicant on 28.08.2023. It was her case that the subject matter herein is LR No Kagaari/Weru/4392, a resultant subdivision of LR No Kagaari/Weru/382, which had a long standing dispute in Embu Chief Magistrates Court civil case No 36 of 1991. That the original land parcel was the property of Marigu Clan and the members of the said clan were contributing money to facilitate prosecution of



- the case. That since the respondent didn't want to pay the money, he decided to dispose of his share, being parcel 4392. That the respondent is in the process of evicting her from land parcel 4392 and if the orders sought are not granted, she stands to suffer hardship as she may not be able to proceed with the appeal herein.
3. That the suit land will be exposed to adverse dealings by the respondent including sale, transfer, lease or mortgage of the land to third parties which would render the appeal nugatory. That it is imperative to preserve the subject matter of the appeal to await determination of the same. That the appeal is arguable and has a high chance of success. That her advocate has applied for certified copies of proceedings and judgement to enable them to prosecute the appeal expeditiously. Ultimately it is urged that the application be allowed as prayed. Attached to the application is a photo of miraa/Khat said to be planted and maintained by the applicant, a memorandum of appeal, and a copy of an advocates letter requesting for certified copies of proceedings and judgement.
 4. The application was responded to by the respondent vide a replying affidavit dated 07.11.2023. He deposed that the applicant has not satisfied the conditions for stay of execution as required. That the applicant has not demonstrated what loss she will suffer if the land is registered in the names of the respondent. That the decree has already been executed and thus this application has been overtaken by events. That the applicant has not shown that if the land is registered in his – meaning respondents names, he will do anything to defeat the appeal if it eventually succeeds. That the applicants appeal is totally hopeless and stands no chance of succeeding as she fraudulently acquired the land.
 5. It was agreed that the application be disposed of by way of written submissions. The applicant's submissions were filed 10.01.2024 where she submitted that the principles guiding the grant of stay of execution pending appeal are provided for under Order 42 rule 6(2) of the [Civil Procedure Rules](#). That the applicant must show that the intended appeal is arguable, which she has done as the memorandum of appeal shows that the grounds therein are triable. That the applicant has also brought the application without delay as the lower court judgement was delivered on 25.07.2023 while the present application was filed on 22.08.2023 (The record shows the application was filed on 19.09.2023).
 6. It was submitted that the applicant has demonstrated that she stands to suffer substantial loss as she is apprehensive that her family, which has been in occupation of suit parcel 4392 for 23 years and using it to cultivate seasonal and commercial crops will lose its livelihood should it be evicted. That the purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The cases of [RWW v EKW](#)(2019) eKLR and [Absalom Dova v Tarbo Transporters](#) (2013) eKLR were cited in support of this argument.
 7. It was further submitted that if the court were to deny the applicant the order for stay, it would place her at a more prejudicial position than the respondent. That while the respondent will have to wait long to enjoy the fruits of his judgement, the applicant has adequately demonstrated that she is likely to suffer loss should she be evicted from the suit land she has called home for the last 23 years. It was urged that the applicant has proved her case on a balance of probabilities as required in law and ought to be granted the prayers sought in the application. Other cases that were cited to persuade this court were those of [Mugenyi & Co. Advocates v National Insurance Corporation](#) (Civil Appeal No 13 of 1984) Court of appeal of Uganda, [James Wangalwa & another v Agnes Naliaka Cheseto](#) (2012) eKLR among others.
 8. The respondent's submissions on the other hand are dated 26.04.2024. It is not clear on which date they were filed. He submitted that the applicant has not satisfied the conditions set out under Order 42 Rule 6 for granting stay of execution. That the court in the case of [Hamisi Juma Mbaya v Amakecho Mbaya](#) (2018)eKLR held that the appellant, before being granted orders for stay, needs to satisfy the



- court; that substantial loss may result to them unless the order is made, that the application has been made without unreasonable delay, and that such security as the court orders for the due performance of the decree or order as may ultimately be binding on him has been given.
9. It was submitted that the decree has been executed and thus there is nothing to stay. That the applicant has not offered any security as the law requires. That the balance of convenience tilts in favour of the respondent. He averred that he has been denied use of his land since 2018 and that the applicant has failed to exhibit the true status of the suit land as of now. That further, the applicant has not demonstrated that if the respondent executed the decree and the suit land is registered in his name he intends to sell or alienate it in any way to defeat the appeal.
 10. 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 an order of stay of execution pending appeal.
 11. The relevant law governing applications for stay of execution pending appeal is 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.
 12. The power to grant stay of execution is a discretionary one and the court of appeal in the case of [Butt v Rent Restriction Tribunal](#) (1982) KLR 417 as cited in [Francis K. Chabari & another v Mwarania Gaichura Kairubi](#) [2022] eKLR gave guidance on how a court should exercise the said discretion. It held that:
 - “ 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in 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.
 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.



4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. 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 for costs as ordered will cause the order for stay of execution to lapse.”
13. The question here is whether the applicant has satisfied the requirements for grant of stay of execution. That is, that substantial loss may result to her unless the stay is granted, that the application has been made without undue delay, and that she has given security or is ready to give security for due performance of the decree.
 14. The judgement that is the subject of the appeal herein was delivered on 25.07.2023 whereas the application for stay was filed on 19.09.2023. This translates to a period of about a month and 25 days which to me is not so unreasonable.
 15. The applicant says that she has demonstrated that she stands to suffer substantial loss should the order of stay of execution not be granted as she will be evicted from the suit land which she has called home for the last 23 years. That the suit land herein will be exposed to adverse dealings by the respondent and could potentially change hands, hence rendering the appeal nugatory. The respondent on the other hand claims that the decree of the lower court has already been executed and so the application has been overtaken by events though he tendered no evidence of the same.
 16. The effect of the lower court judgement was to cancel and transfer title to the suit land from the registered proprietor, who is the applicant’s deceased husband, in favour of the respondent. The applicant has expressed that she has resided on the suit land for the last 23 years, a fact which has not been disputed by the respondent. She has expressed fears that she might be evicted from the land and that the land could also exchange hands thus rendering the appeal nugatory. I find this to be a reasonable fear in the circumstances. I am also satisfied that the applicant has demonstrated what substantial loss she stands to suffer should the orders sought not be granted.
 17. The Applicant has also filed an appeal which, in her view, raises triable issues. She has provided a memorandum of appeal which I have examined and found it raises triable issues.
 18. Although the applicant has not expressed whether she 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.
 19. The upshot of the foregoing is that I allow the notice of motion dated 28.08.2023 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 60 days from the date of this ruling failing which the order of stay will automatically lapse.
 - b. The applicant shall compile, file and serve a record of appeal within 60 days from the date of this ruling.
 - c. Costs of the application to be in the cause.



RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 11TH DAY OF JUNE, 2024.

In the presence of Njage Collins for appellant/applicant, Ms Mbaka for Mugambi Njeru for respondent.

Court Assistant - Leadys

A. KANIARU

JUDGE – ELC, EMBU

11.6.2024

