



**Githuku v Gitichie & 3 others (Sued in the capacity of the legal administrator of the estate of Tabitha Njoki Mwangi - Deceased) (Environment & Land Case 101 of 2023) [2024] KEELC 4486 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4486 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT & LAND CASE 101 OF 2023**

**YM ANGIMA, J**

**JUNE 6, 2024**

**BETWEEN**

**BENJAMIN NJUGI GITHUKU ..... PLAINTIFF**

**AND**

**MARGARET WAIThERA GITICHIE ..... 1<sup>ST</sup> DEFENDANT**

**ROSE WAMBUI MWANGI ..... 2<sup>ND</sup> DEFENDANT**

**WANJIRU MWANGI GICHUHI ..... 3<sup>RD</sup> DEFENDANT**

**STEPHEN MARERI KAMAU ..... 4<sup>TH</sup> DEFENDANT**

**SUED IN THE CAPACITY OF THE LEGAL ADMINISTRATOR OF THE  
ESTATE OF TABITHA NJOKI MWANGI - DECEASED**

**RULING**

**A. Introduction**

1. By a judgment dated 23.11.2023 the court entered judgment for the Plaintiff in the following terms upon a full hearing of the suit:
  - a. A declaration be and is hereby made that the Plaintiff is entitled to be registered as the absolute owner of 3 acres out of Title No. Nyandarua/Silibwet/4749 as a purchaser for value.
  - b. An order of specific performance is hereby granted against the 4<sup>th</sup> Defendant in his capacity as the administrator of the estate of the deceased vendor, Tabitha Njoki Mwangi, to transfer the said portion of 3 acres out of Title No. Nyandarua/Silibwet/4749 to the Plaintiff in default of which the Deputy Registrar of the court shall sign all the necessary forms, documents and instruments on his behalf to facilitate the transfer to the Plaintiff.



- c. A permanent injunction be and is hereby granted restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their agents, servants or assignees from further trespassing on the Plaintiff's portion of 3 acres to be excised from Title No. Nyandarua/Silibwet/4749 or from howsoever dealing with the said portion in a manner inconsistent with the Plaintiff's use and enjoyment thereof.
  - d. The Plaintiff is hereby awarded costs of the suit to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly and severally.
  - e. Any prayer sought which has not been specifically granted herein is deemed to have been denied.
2. Being aggrieved by the said judgment the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (the Defendants) filed a notice of appeal dated 28.11.2023 intimating their intention to lodge an appeal against the whole of the said judgment to the Court of Appeal. They also requested the Deputy Registrar to supply them with certified copies of the proceedings and judgment for purposes of the intended appeal.

### **B. 1<sup>st</sup> & 2<sup>nd</sup> Defendants' Instant Application**

3. Vide a notice of motion dated 22.12.2023 expressed to be brought pursuant to Sections 1A, 1B and 63(e) of the *Civil Procedure Act* (Cap.21), Order 42 rule 6(1) of the *Civil Procedure Rules*, 2010 (the Rules) and all enabling provisions of the law, the Defendants sought a stay of execution of the judgment and decree dated 23.11.2023 pending the lodging, hearing and determination of their intended appeal. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Margaret Waithera Gitiche on 22.12.2023 and the exhibits thereto.
4. The Defendants contended that unless the stay sought was granted they stood to suffer substantial loss because they were in possession of the disputed portion of 3 acres on which they had cultivated some crops. It was contended that in the absence of a stay they shall not be able to access the land hence their crops shall go to waste. The Defendants were also apprehensive that unless the stay sought was granted their intended appeal shall be rendered nugatory and a mere academic exercise should it ultimately succeed. They also offered to provide reasonable security for due performance of the decree which may ultimately be binding upon them.

### **C. Plaintiff's Response**

5. The Plaintiff filed a replying affidavit sworn on 11.01.2024 in opposition to the application on several grounds. First, it was contended that the application was filed in bad faith and was merely intended to deny him the fruits of his judgment. Second, that there was no evidence of substantial loss since there was no house on the suit property and that the current planting season had not yet set in. Third, there was no demonstration that the intended appeal shall be rendered nugatory in the absence of a stay. Fourth, that the Defendants had not provided a definite security for due performance of the decree should their intended appeal ultimately fail. As a result, the court was urged to dismiss the application with costs.

### **D. 1<sup>st</sup> & 2<sup>nd</sup> Defendants' Rejoinder**

6. The Defendants filed a supplementary affidavit sworn by Margaret Waithira Gitiche sworn on 13.02.2024 in response to the Plaintiff's replying affidavit. She stated that the intended appeal raised arguable issues and that she had exhibited photographic evidence of the crops they were cultivating on the land. The Defendants further contended that as step children of the deceased owner of the suit



property they had applied for a grant of letters of administration for her estate and that the application was pending before the succession court at Nakuru.

#### **E. Directions on Submissions**

7. When the application was listed for inter partes hearing 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 Defendants filed submissions dated 26.02.2024 whereas the Plaintiff's submissions were dated 21.03.2024.

#### **F. Issues for Determination**

8. The court has considered the Defendants' notice of motion dated 22.12.2023 the Plaintiff's replying affidavit in opposition thereto as well as the Defendants' supplementary affidavit. The court is of the view that the following are the key issues for determination herein:
  - a. Whether the Defendants have made out a case for the grant of a stay pending appeal.
  - b. Who shall bear costs of the application.

#### **G. Analysis and Determination**

##### **a. Whether the Defendants have made out a case for the grant of a stay pending appeal**

9. The court has considered the material and submissions on record. Whereas the Defendants submitted that they had satisfied the requirements for a grant of stay pending appeal, the Plaintiff contended otherwise. The parties cited various authorities in support of their respective submissions.
10. There is no doubt from the material on record that the Defendants' application was essentially grounded upon Order 42 rule 6(2) of the *Rules* which stipulates 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.”
11. In the case of *Kenya Shell Limited v Karuga & Another* [1986] eKLR the Court of Appeal held, inter alia, that:

“It is usually a good rule to see if Order 41 rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented...”
12. On the other hand, in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR, it was held, inter alia, that:

“It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion



in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church (No.2)* 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458:

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

13. There is no doubt from the material on record that the Defendants are cultivating some crops on the suit property. They did not, however, disclose the type or species of crops they were growing and their maturity period. It is not possible to discern from the exhibited photographs what kind of crops are being grown apart from what appeared to be vegetable and potatoes. There was no allegation that the Defendants had any dwelling houses on the suit property or that they were residing thereon. There was no allegation that the Plaintiff intended to charge, lease, transfer or alienate the suit property. As a result, the court is unable to find any demonstration of substantial loss.
14. The court has considered the Defendants’ submissions that there was a risk of their intended appeal being rendered nugatory in the absence of a stay. The court is aware that the meaning of the term nugatory has been judicially considered in previous decided cases. For instance, in the case of *Stanley Kang’ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR it was held that:
  - “ix) The term ‘nugatory’ has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at 232.
  - x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved.”
15. The court is not satisfied from the material on record that the intended appeal shall be rendered nugatory in the absence of a stay. There is no evidence on record from which it may be concluded that the suit property shall not be available to the Defendants should their intended appeal ultimately succeed. There is no evidence on record to demonstrate that the suit property shall not be recoverable from the Plaintiff should the Defendants be successful in their appeal.
16. There is no allegation or demonstration that the Plaintiff intends to sell, charge, lease, transfer or lease the suit property. The court takes the view that transfer of property is a reversible process. As a result, the court is not satisfied that the Defendants have made out a case for the grant of a stay pending appeal. The court is, however, inclined to allow the Defendants to harvest and remove their crops from the suit property at their own cost within a limited period of time.

#### **b. Who shall bear costs of the application**

17. 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 v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The court finds no good reason to depart from the general rule. As a result, the Plaintiff shall be awarded the costs of the application to be borne by the Defendants.



## H. Conclusion and Disposal Orders

18. The upshot of the foregoing is that the court finds and holds that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have failed to satisfy the requirements for the grant of a stay pending appeal. As a consequence, the court makes the following orders for disposal of the application.
- a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' notice of motion dated 22.12.2023 be and is hereby dismissed.
  - b. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants shall, however be at liberty to harvest and remove, at their cost, any crops they had cultivated within 3 months from the date hereof.
  - c. The Plaintiff is hereby awarded costs of the application.

Orders accordingly.

**RULING DATED AND SIGNED AT NYANDARUA THIS 6<sup>TH</sup> DAY OF JUNE, 2024 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

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**Y. M. ANGIMA**

**JUDGE**

In the presence of:

Mr. Ndegwa Wahome holding brief for Mr. Ojare for the Plaintiff

Mr. Kinyua Njogu for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

N/A for the 3<sup>rd</sup> Defendant

N/A for the 4<sup>th</sup> Defendant

C/A - Carol

