



**Kageni v Wathigo (Environment and Land Appeal E033 of 2024)
[2024] KEELC 5655 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5655 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E033 OF 2024**

JG KEMEI, J

JULY 30, 2024

BETWEEN

DOUGLAS KINYANJUI KAGENI APPELLANT

AND

SAMUEL KAGENI WATHIGO RESPONDENT

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion Application dated 3/4/2024 expressed under Sections 1A, 1B of the *Civil Procedure Act* and Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking in the main stay of execution of Judgment delivered in Kiambu CMCC ELC Case No. 60 of 2022 delivered on 27/3/2024.
2. The Application is based on grounds that the said Judgment will be executed; that aggrieved with the Judgment, the Applicant has filed an appeal against it; the Appellant is the son of the Applicant (sic) and alongside other family members, has been residing on the suit land namely Githunguri/Nyaga/T.581 since birth; the Respondent and his second wife reside in a different house on the same parcel of land without any interruptions and at the instigation of his 2nd wife, the Respondent has been coerced to evict the Applicant from the suit land with a view of selling the suit land among other properties.
3. In his Supporting Affidavit the Applicant rehashed the above grounds and deponed that out of cruelty meted on his late mother by the Respondent, the Applicant's late mother proceeded to place cautions on Githunguri/Nyaga/321, 323A, 7.572, T.581, T.620 and T.379 in the year 2000. See copies of the official searched marked DK-1. That subsequently the Applicant registered the said cautions in 2004. That later his mother passed on in the year 2021 and the Respondent demanded the lifting of the cautions to which the Applicant declined and instead filed the lower Court suit, Kiambu CMCC ELC No. 68 of 2022. Copies of the impugned Judgment, Memorandum of Appeal and letter requesting the typed proceedings are annexed as Dk-2, Dk-3 & Dk-4 respectively.



4. In opposition, the Respondent Samuel Kageni Wathigo swore his Replying Affidavit on 23/4/2024 and deposed that he sought to evict the Respondent from the suit land as well as his house formerly occupied by his late wife Hannah Wanjiku Kageni, the Applicant's mother. That he also prayed for removal of caution on the named properties placed by the Applicant which he maintained legally belong to him. That he inherited them from his parents to hold in trust for him and his deceased brothers. That due to past misunderstandings between the parties, including physical attacks, the Respondent's security is at stake and granting the Application will gravely prejudice him.
5. The Application was canvassed by way of written submissions.
6. The firm of Mburu Machua & Co. Advocates filed submissions dated 7/5/2024 on behalf of the Applicant whereas the Respondent's submissions dated 17/5/2024 were filed by Njoroge Baiya & Co. Advocates.
7. The Applicant submitted that he has an arguable appeal noting that his late mother and the Respondent acquired many properties together but they were all registered under the Respondent's name. That the impugned Judgment ordered his eviction from the suit land which at all material times has been the Applicant's parents' matrimonial home. That the Respondent and other family members have ganged up to evict him despite being the only surviving child of the 1st house. Therefore, if an order of stay is not granted, the Applicant is apprehensive that he will be evicted from the suit land and removal of the cautions on the other parcels of land will highly affect the posterity of the 1st house. Further the Applicant asked this Court to stay further proceedings in the trial Court and highlighted that he has satisfied the criteria for granting stay of execution.
8. In rebuttal, the Respondent stated that the Applicant has not elaborated any substantial loss and damage he is likely to incur if the Order of stay is not granted. That in the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* [2012] eKLR it was held that an Applicant must show other factors which will irreparably negate his appeal. That the Respondent is elderly and deserves to fulfill his duties as a trustee of the suit land without any hindrance.
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 Vs. 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? Before addressing this issue, I note that the issues the Applicant drew for determination namely arguability of appeal and whether the intended appeal will be rendered nugatory are not applicable to an appeal to this Court. Those principles relate to appeal to the Court of Appeal as rightly stated in the case of *Stanley Kangethe Kinyanjui Vs. Tony Ketter & Others* [2013]eKLR.

13. The guidelines for stay of execution for an appeal to this Court are anchored under Order 42 Rule 6(2) of the *Civil Procedure Rules*. The Applicant contends that he is on verge of being evicted from the suit land which according to him belongs to his late mother. It is trite that execution on its own is does not amount to substantial loss because it is a lawful process. See the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* [2012] eKLR. The Respondent avowed that the suit land is his and he is entitled to use it as he wishes to the exclusion of the Applicant who is mean and hostile to him and his current wife. In my view the Applicant has not demonstrated the substantial loss he stands to suffer if the order of stay is not granted.

14. On whether the Application was timeously filed, being less than a week of delivery of the impugned Judgment, I find that the same is not inordinate.

15. Purely in the interests of justice, I find that the Application is allowed.

16. Costs shall be in the cause.

17. Orders accordingly.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 30TH DAY OF JULY 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Ndichu HB Machua for Appellant/Applicant

Baiya for Respondent

Court Assistants – Phyllis/Oliver

