



**Kihura v Njoroge (Sued as the Legal Representative of the Estate of Njoroge Matumbia, Deceased)
(Environment & Land Case 48 of 2021) [2024] KEELC 5741 (KLR) (30 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5741 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 48 OF 2021**

JG KEMEI, J

JULY 30, 2024

BETWEEN

PATRICIA WANJIKU KIHURA APPELLANT

AND

MWANGI NJOROGE RESPONDENT

**SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NJOROGE
MATUMBIA, DECEASED**

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion Application dated 26/4/2023 expressed under Sections 1A, 1B of the *Civil Procedure Act* and Order 42 Rule 6 (1) of the Civil Procedure Rules seeking in the main, stay of execution of Judgment delivered herein on 13/4/2023.
2. The Application is based on grounds on the face of it which are restated in the Supporting Affidavit of Patricia Wanjiku Kihura. She deposed that she is aggrieved with the said Judgment and wishes to appeal against it as evidenced by the Notice of Appeal dated 26/4/2023 annexed as PWK1. That if the impugned Judgment is executed, it would occasion her untold agony and anguish in light of the averment that one of her daughters is buried on the subject parcel of land. That the Application has been timeously filed and the applicant is ready and willing to deposit security for the due performance of the decree and no prejudice will be visited upon the Respondent.
3. Opposing the Application, the Respondent Mwangi Njoroge swore his Replying Affidavit dated 26/5/2024 and avowed that indeed this Court rendered its Judgment on 13/4/2023 in his favor by affirming the trial Court Judgment in MCLE No. 139 of 2019. That the Application is vexatious and frivolous since the Applicant does not reside on the property and therefore there is no threat of eviction and both the trial and appellate Courts have pronounced themselves on the issue of interred remains on the suit property. That the Application is only meant to deny him the fruits of his Judgment and being elderly, he will be greatly prejudiced if the Application is allowed.



4. On 7/6/2023 directions were taken and parties elected to canvass the Application by way of written submissions.
5. The firm of Njugi B. G & Co. Advocates filed submissions dated 14/5/2024 on behalf of the Applicant whereas the Respondent's submissions dated 21/5/2024 were filed by Njoroge Kugwa & Co. Advocates.
6. Drawing a singular issue for determination, the applicant submitted that unless the stay order is granted, she stands to lose the suit property she purchased from the Respondent. That she is a bona fide purchaser for value of the suit property which she has been in possession of for over a decade now. That having satisfied the threshold for granting stay of execution as provided for under Order 42 Rule 2 of the Civil Procedure Rules, should her appeal succeed the Respondent will not be able to repay her the irreparable harm she stands to suffer. That having established substantial loss and filed her Application timeously, she is ready and willing to abide by any terms of security that the Hon Court may impose.
7. On the other hand, the Respondent highlighted the provisions of Rules 84 & 85 of the Court of Appeal Rules that stipulate the timelines for lodging an appeal. That in this case, the applicant filed her notice of appeal over a year ago but no appeal has been formally filed in the Court of Appeal. That the applicant is abusing Court process and hampering him from enjoying fruits of his Judgment. According, therefore, the Applicant's Notice of Appeal died a natural death in having failed to comply with the statutory timelines. To support that position reliance was placed in the Court of Appeal decision in Mae Properties Limited Vs. Joseph Kibe & Anor. [2017] eKLR. That there being no appeal the order for stay of execution cannot issue.
8. Additionally, the Respondent relied on Section 7 of the Civil Procedure Act and stated that litigation must come to an end. He urged the Court to dismiss the Application with costs.
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 of execution 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? The Applicant contends that she is on verge of being evicted from the suit land as the Respondent is intent on executing the Judgment in his favor. 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 refuted the claim on eminent eviction and deposed that eviction does not arise simply because the applicant does not reside on the suit property. Be that as it may the applicant bore the burden of proving her claims to detonate substantial loss. She did not do so.
13. On whether the Application was timeously filed, I note that the Application was filed on 27/4/2023, barely two weeks after the delivery of the impugned Judgment. Certainly it was timeously filed. Last but not least, the Applicant did not offer any security for the due performance of decree as required under Order 42 rule 6 (2) of the Civil Procedure Rules.
14. The Respondent detailed in great length the timelines applicable for filing appeals under the Court of Appeal. It is not in doubt that this Court is governed by the Civil Procedure Rules and only can only consider the limbs set out in Order 42 above. This Court cannot usurp the jurisdiction and powers of the Appellate Court and apply the Court of Appeal rules in the instant case.
15. Purely in the interests of justice the Application dated 26/4/2023 is allowed in the following terms:-
 - a. The Applicant to deposit a security for costs in the sum of Kshs. 100,000/- deposited in a joint account within 30 days from today.
 - b. In default of (a) above this order shall lapse automatically.
 - c. Costs of the Application to abide the outcome of the Appeal.
16. 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;

Njugi for Appellant

Ms. Waigwa for the Respondent

Court Assistants – Phyllis/Oliver

