



**Ihururu Housing Co-operative Society Limited v Ng'ayu & another (Environment and Land Appeal 34 of 2022) [2024] KEELC 5703 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5703 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 34 OF 2022**

**JO OLOLA, J  
JULY 26, 2024**

**BETWEEN**

**IHURURU HOUSING CO-OPERATIVE SOCIETY LIMITED ..... APPELLANT**

**AND**

**CECILIA KARURU NG'AYU ..... 1<sup>ST</sup> RESPONDENT**

**IHURURU DAIRYMEN'S CO-OPERATIVE SOCIETY LTD .. 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Notice of Motion dated 22<sup>nd</sup> June 2023, Ihururu Housing Co-operative Society Ltd (the Appellant) prays for an order of stay of execution of the Judgment and consequent decree arising from the Judgment delivered on 7<sup>th</sup> November 2022 in Nyeri MCL & E No. 18 of 2020 pending the hearing and final determination of the Appeal.
2. The application which is supported by an Affidavit sworn by the former Vice-Chairman of the Appellant Michael Gachinga Kanure is premised on the grounds that:-
  - a. A ruling dismissing the Appellant's application for stay of execution was delivered in the trial court on 14/6/2023 thereby exposing the Appellant to execution;
  - b. The Appellant being aggrieved by the entire Judgment awarding the Respondent the sum of Kshs. 765,265/= has appealed to this court against the same;
  - c. The Appeal shall be rendered nugatory and the Appellant will suffer irreparable loss and damage unless the orders sought are granted;
  - d. There was clearly an error on the face of the record in entering Judgment against the Appellant; and



- e. The application has been brought without unreasonable delay and the Appellant has an arguable appeal with a high chance of success.
3. Cecilia Karuru Ngayu (the 1<sup>st</sup> Respondent) is opposed to the application. In her Replying Affidavit sworn on 14<sup>th</sup> July 2023, the 1<sup>st</sup> Respondent avers that on 10<sup>th</sup> November 2022 the court delivered Judgment in her favour and dismissed the suit against the 2<sup>nd</sup> Respondent with costs.
4. The 1<sup>st</sup> Respondent further avers that the Appellant subsequently filed an application dated 20<sup>th</sup> December 2022 seeking a stay of execution of the Judgment and that the same was dismissed by the court on 14<sup>th</sup> June 2023.
5. The 1<sup>st</sup> Respondent asserts that the Memorandum of Appeal filed herein does not raise any arguable grounds of appeal and that the same is a mere academic exercise not deserving of this court's attention. It is further the 1<sup>st</sup> Respondent's case that it would be unfair for the court to grant an order of stay of execution while there is a valid Judgment delivered by a competent court of law while the Appellant has been aware of the said Judgment.
6. I have carefully perused and considered the application as well as the response thereto. In respect of matters of stay of execution, Order 42 Rule 6 of the *Civil Procedure Rules* provides as follows:-

“6.

- (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 orders set aside.
- (2). No order for stay of execution shall be made under sub-rule 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 undue 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.”
7. Arising from the foregoing, it is self-evident that a party seeking an order of stay of execution has to demonstrate before the court that:-
  - a. substantial loss may result to him/her unless the order is made;



- b. the application has been made without unreasonable delay; and
  - c. the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant.
8. As was stated in *RWW v EKW* [2019] eKLR:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so the court should weigh this right against that of a successful litigant who should not be deprived of the fruits of his/her Judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

9. Considering what would amount to substantial loss, the court in *James Wangalwa & Another v Agnes Naliaka Chezeto* [2012] held as follows:-

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *Civil Procedure Rule*. This is so because execution is a lawful process. The applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal....the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

10. In the matter before me, the application is supported by an affidavit of one Michael Gachinga Kanure who describes himself as a former Vice-Chairman of the Appellant. It was not clear to the court why the application was not supported by an affidavit sworn by the current officials of the Appellant. Be that as it may, the deponent swears at the relevant Paragraphs 2 to 4 of the Supporting Affidavit as follows:-

- 2. That a ruling dismissing the appellant’s application for stay of execution was delivered on 14/6/2023, thus exposing the appellant to execution. (Annexed and marked “MGK1” is a copy of the said Ruling);
- 3. That on 10/11/2022 the Honourable Trial Magistrate entered Judgment against the Appellant herein in Nyeri ELC No. 18 of 2020 and granted the Respondent orders against the applicant thereby ordering the applicant to pay a decretal sum of Kshs. 440,000/= together with interest and costs of the suit bringing the total amount to Kshs. 765,265/=. (Annexed and marked MGK2” is a copy of the said copy of the decree); and
- 4. That (there) was no stay of execution that was given on 10/11/2022 after the delivery of the Judgment we seek to appeal from which prompted us to file an application for stay of execution dated 20<sup>th</sup> December 2022 which has now been dismissed.”



11. I was unable to discern from a perusal of the averments made herein above what loss if any the Appellant stood to suffer. As was stated in David Karanja Ngugi v Duncan Rarwat Kereto [2020] eKLR:-

“The court again made it clear in *Machira T/A Machira & Co. Advocates v East African Standard No. 2* {2002} 2 KLR 63, that in attempting to demonstrate to court that substantial loss is likely to be suffered, the applicant is under a duty to do more than merely repeating words of the relevant statutory provision or general words used in a decided case cited as a judicial precedent for guidance. The court emphasized that it is not enough merely to state that substantial loss will result, or that the appeal if successful will be rendered nugatory as that will not do.”

12. In my considered view, the Appellant herein has failed to demonstrate how it stands to suffer substantial loss if the orders sought are not granted. Again, this being a monetary decree, it was incumbent upon the Appellant to offer security for the due performance of the decree to warrant a stay of execution. That has not been done.

13. In the premises, I am not satisfied that the application before the court has met the threshold for the grant of an order of stay of execution. The same is dismissed with costs in the Appeal.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 26<sup>TH</sup> DAY OF JULY, 2024.**

In the presence of:-

Mr. Magua for the Appellant.

Ms. Wanjila holding brief for Karweru for 1<sup>st</sup> Respondent and Kioni for 2<sup>nd</sup> Respondent.

Court Assistant: Michael

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**J. O. OLOLA**

**JUDGE**

