



**Kariuki v Ndegwa (Environment and Land Appeal E027 of 2024)
[2024] KEELC 5520 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5520 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E027 OF 2024**

**MAO ODENY, J
JULY 23, 2024**

BETWEEN

PETER MWANGI KARIUKI APPELLANT

AND

JOHN KIROGO NDEGWA RESPONDENT

*(Being an Appeal arising from the Judgment of Hon Lina Akoth
delivered on 9th May, 2024 in Nakuru CMELC No E234 of 2023)*

RULING

1. This ruling is in respect of a Notice of Motion dated 7th June, 2024 by the Appellant/Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to order a stay of execution of the Judgment delivered by Hon. Lina Akoth on 9th May 2024 in Nakuru CMELC No. E234 of 2023 (*John Kirogo Ndegwa- v Peter Mwangi Kariuki*) pending the hearing and determination of this Appeal.
 - d. That the costs of this Application be provided for.
2. The application was based on the grounds on the face of the application and the supporting affidavit of Peter Mwangi Kariuki where he deponed that he is aggrieved by the decision of the Magistrate's court which ordered him to excise 0.5 acres from the suit land being LR No Bahati/BahatiBlock1/5139 and transfer the same to the Respondent and further pay Ksh 340,000/= as general damages for breach of contract.



3. The Respondent opposed the application vide a Replying Affidavit dated 21st June, 2024 where he deponed that the Applicant has not met the threshold of for grant of stay of execution as provided for under Order 42 Rule 6 of the Civil Procedure Rules.
4. He further deponed that the applicant will not suffer any irreparable loss if stay of execution is not granted as the respondent has been in possession of the suit parcel since 5th July, 2023 when he purchased the same from the Applicant and has constructed structures thereon.
5. The Respondent also stated that the 0.5 acres has already been excised from Bahati/Bahati Block1/5139 as per the prepared mutation and what is remaining is the issuance of a title deed in the name of the Respondent but the same has not been done as the Applicant has refused to release the original title.

Applicant's Submissions

6. Counsel for the Appellant identified the issue for determination as whether the instant application satisfies the requirements for the grant of stay of execution and who should bear the costs.
7. Counsel relied on the cases of Butt v Rent Restriction Tribunal [1979], RWW v EKW [2019] eKLR., Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others [2013] eKLR, Nicholas Stephen Okaka & Another v Alfred Waga Wesonga (2022) eKLR and prayed that stay of execution be granted to preserve the subject matter.
8. Mr. Baraza submitted that should the Applicant be compelled to pay the liquidated sum, there is no assurance that should he succeed in his appeal, the Respondent shall be in a position to refund the same. Further that given that the Respondent is in occupation of the disputed portion of the suit land, he shall neither suffer substantial nor irreparable harm.
9. Counsel submitted that the instant application has been brought in good time as the impugned judgment was delivered on 9th May, 2024, the Memorandum of Appeal was lodged on 6th June, 2024 and the instant application was filed on 7th June, 2024.
10. Counsel gave a proposal that a portion of the decretal sum of Ksh 100,000/= be deposited in a joint account in the name of counsel for both parties which he termed as reasonable and fair.

Respondent's Submissions

11. Counsel relied on the case of Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa [2016] and submitted that the applicant shall not suffer any loss if the orders sought are not granted as the subject matter is land which is an immovable asset and would be available to any party who would eventually succeed in the Appeal.
12. Counsel submitted that the Respondent has not extracted the decree and as such, there is no imminent threat that is likely to be posed to the disputed portion of land. Further that the application was filed after 30 days which he termed as inordinate delay and the same has not been explained by the Applicant.
13. Mr. Mwangi submitted that the amount of Ksh 100,000/= as security is not sufficient and relied on the case of Kariuki Njuri v Francis Kimaru Rwara (suing as Administrator of Estate of Rwara Kimaru alias Benson Rwara Kimaru (Deceased)) [2020] Counsel submitted that the applicant having been ordered to pay the Respondent Ksh 340,000/= for breach of contract and to bear the costs of the suit should deposit Ksh 500,000/= in court.



Analysis and Determination

14. The issue for determination is whether the Applicant has met the threshold for grant of stay of execution as provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:

“

- “(2) No order for stay of execution shall be made under sub rule (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.”

15. The issue is whether the applicant has met the above requirements. On the issue as to whether the application was filed without unreasonable delay, it is on record that the impugned judgment was delivered on 9th May, 2024 and while the current application was filed on 7th June, 2024 and therefore it was filed timeously.

16. On the issue of substantial loss, the Appellant submitted that bearing in mind that the judgment is for a liquidated sum of Ksh 340,000/= as well as subdivision and transfer of a portion of the suit land, the appellant stands to suffer substantially. The Respondent on the other hand submitted that the applicant shall not suffer any loss if the orders sought are not granted as the subject matter is land which is an immovable asset and would be available to any party who would eventually succeed in the Appeal.

17. In the case of [Noor Said v Mary Mwawasi Manga](#) [2022] eKLR the court held as follows:

“The critical issues arising in this application are whether the applicant stands to suffer substantial loss if the order of stay is not granted and the question of security. The applicant has of course argued that if she is evicted and the respondent deals with the property, and she subsequently succeeds on appeal, she may find no house to return to. I am persuaded that if this happens then the applicant may suffer substantial loss. However, I think this is one case where the circumstances demand for security to be presented.”

18. In the case of [Mwaura & another v Naserian \(Sued as the legal representatives of the Estate of the Late Josephine Asiagi Kasembe\)](#) (Environment and Land Appeal E35 of 2023) [2024] KEELC 636 (KLR), the court held as follows:

“The court must balance the rights of the successful litigant and one who wants to try a second bite of the cherry. That is why there is a hierarchy of courts that can provide reprieve in a case where a party is dissatisfied with the outcome of his/her case.”

19. Similarly, in the case of [Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd](#) [2019] eKLR the Court held that:

“...the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the [Civil Procedure Rules](#), it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the



appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal.”

20. It is admitted that the respondent is in possession of the suit land and is in the process of transferring the same in his name. The court has to balance the rights of a successful litigant and a party who wants to exercise his right of appeal.
21. I find that the applicant has met the threshold for grant of orders of stay of execution and order that an order of status quo be maintained and no transfer of the suit property to be effected pending the hearing and determination of the appeal. The Applicant to deposit Kshs. 150,000/ in a joint interest earning account of the advocates on record within 30 days. Costs of the application to abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF JULY 2024.

M. A. ODENY

JUDGE

