



**Gichae v Wambui (Environment and Land Appeal 40 of 2023)  
[2024] KEELC 6388 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6388 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND APPEAL 40 OF 2023  
YM ANGIMA, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**PHILIP PATRICK KARIUKI GICHAЕ ..... APPELLANT**

**AND**

**SAMUEL KIHANGA WAMBUI ..... RESPONDENT**

**RULING**

**A. Introduction**

1. By a judgment dated 09.05.2024 the court allowed the Appellant’s appeal against the Respondent and made a declaration that the Respondent was holding Title No. Nyandarua/Oljoro’Orok Salient/2131 (the suit property) in trust for the Appellant. The court also ordered the dissolution of the said trust and directed that the Appellant be registered as proprietor of the suit property.
2. Being aggrieved by the said judgment, the Respondent filed a notice of his intention to the Court of Appeal against the decree. The Respondent thereafter filed an application for stay of execution of the decree pending the lodging, hearing and determination of his intended appeal.

**B. Appellant’s application**

3. Vide a notice of motion dated 15.05.2024 expressed to be brought pursuant to Sections 1A, 1B, 3A & 63(e) of the *Civil Procedure Act* (Cap.21), Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules, 2010* (the Rules) and all other enabling provisions of the law, the Respondent sought a stay of execution of the decree dated 09.05.2024 and all consequential orders pending the filing, hearing and determination of his intended appeal.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Respondent on 15.05.2024 and the annexures thereto. The Respondent stated that there was a likelihood of the suit property being transferred to the Appellant



with the consequence that he might suffer substantial loss. It was further contended that the Appellant shall not suffer any prejudice if the stay sought was granted because the Appellant was already in possession of the suit property.

### **C. Respondent's Response**

5. The Appellant filed a replying affidavit sworn by himself on 01.07.2024 in opposition to the said application. It was disputed that the Respondent had satisfied the requirements for the grant of a stay pending appeal. In particular, it was contended that the Respondent had failed to disclose the nature and extent of the alleged substantial loss.
6. The Appellant stated that he had been in occupation and use of the suit property since 2015 when he bought it for valuable consideration from the Respondent. He stated that there were no valid grounds to warrant the grant of stay of execution hence he was entitled to the fruits of his judgment. He consequently prayed for dismissal of the application with costs.

### **D. Directions on Submissions**

7. When the application was listed for directions, 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 Appellant filed written submissions dated 22.07.2024 whereas the Respondent's submissions were also dated 22.07.2024.

### **E. Issues for Determination**

8. The court has perused the Respondent's notice of motion dated 15.05.2024, the replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following are the main issues for determination herein:
  - a. Whether the Respondent has demonstrated a case for grant of execution pending appeal.
  - b. Who shall bear costs of the application.

### **F. Analysis and Determination**

#### **a. Whether the Respondent has demonstrated a case for grant of execution pending appeal**

9. Whereas the Respondent contended that he had satisfied the conditions for the grant of a stay of execution pending appeal, the Appellant contended otherwise. The Appellant submitted that the Respondent had not demonstrated the requirement of substantial loss as required under Order 42 rule 6(2) of the Rules.
10. Order 42 rule 6(2) of the Rules stipulates as follows:

“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.”



11. The court has fully considered the Respondent's supporting affidavit of 15.05.2024. Apart from a bare statement that he shall suffer substantial loss if the suit property is transferred to the Appellant, there was no demonstration of substantial loss. In particular, there was no disclosure of the nature and extent of the alleged loss, if any. The material on record shows that the Respondent has never been in possession or use of the suit property since 2015 when he sold it to the Appellant.
12. There was no demonstration or even allegation that once the suit property is transferred it shall not be available for restitution to the Respondent should his intended appeal ultimately be successful. There was no allegation or demonstration that the Appellant intends to sell, charge, or transfer the suit property during the pendency of the appeal. The court is of the view that a transfer is a reversible process hence the suit property may still be restored to him in the event of his intended appeal being successful. As a result, the court is not satisfied that the Respondent has demonstrated the element of substantial loss within the meaning of Order 42 rule 6(2) of the Rules. Consequently, the court is not inclined to allow the application for stay of execution.

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

13. 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 consequence, the Appellant shall be awarded costs of the application.

**G. Conclusion and Disposal Order**

14. The upshot of the foregoing is that the court finds no merit in the Respondent's application for stay of execution pending appeal. As a result, the notice of motion dated 15.05.2024 is hereby dismissed with costs to the Appellant.

It is so ordered.

**RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 26TH DAY OF SEPTEMBER, 2024.**

In the presence of:

Ms. Catherine Muigai for the Appellant

Ms. Gicheha for the Respondent

C/A - Carol

.....

**Y. M. ANGIMA**

**JUDGE**

