



Gathua v Wainaina (Environmental and Land Originating Summons E011 of 2023) [2024] KEELC 7247 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7247 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E011 OF 2023
LN GACHERU, J
OCTOBER 31, 2024**

BETWEEN

NICASSIO WAINAINA GATHUA PLAINTIFF

AND

JOHN GATHUA WAINAINA DEFENDANT

RULING

1. The matter for determination is the Notice of Motion Application dated 16th May, 2024, which is premised on the provisions of Order 50, Order 42 Rule (6) (1) of the Civil Procedure Rules, and Article 159 of *the Constitution* of Kenya, wherein the Plaintiff/Applicant has sought for these orders: -
 1. That this Honourable Court be pleased to grant the Applicant an Order for stay of execution of this Court's Judgment delivered on 9th May, 2024, and all consequential Orders thereto pending inter-partes hearing of this Application and/or until further Orders of this Honourable Court.
 2. That this Honourable Court be pleased to grant the Applicant an Order for stay of execution of this Court's Judgment delivered on 9th May, 2024, and all consequential Orders thereto pending the hearing and determination of this Application and/or until further Orders of this Honourable Court.
 3. That this Honourable Court be pleased to grant the Applicant an Order for stay of execution of this Court's Judgment delivered on 9th May, 2024, and all consequential Orders thereto pending the hearing of the Appeal and/or until further Orders of this Honourable Court.
 4. That the costs of this Application be provided for.



2. The Notice of Motion is premised on the grounds enumerated thereon as well as in the Supporting Affidavit sworn by Nicassio Wainaina Gathua (the Applicant/Intended Appellant herein), on 16th May, 2024.
3. The Applicant/Intended Appellant is a son to the Defendant/Respondent, and who had filed an Originating Summons dated 30th May, 2023, seeking Inhibitory Orders restraining the Defendant/Respondent from alienating, selling, disposing or interfering in any manner with land parcel No. LOC.4/Muruka/1062 (the suit property). Further, the Plaintiff/ Applicant had urged the Court to declare the said parcel of land subject of a customary trust on grounds that the suit land is family land, which the Defendant/Respondent inherited from his father.
4. The Defendant/Respondent had opposed the said suit through his Replying Affidavit dated 17th July 2023, and denied the existence of any customary trust in respect of the suit property. The suit was canvassed by way of viva voce evidence and written submissions, and vide its Judgement delivered on 9th May 2024, this court dismissed the Plaintiff/Applicant's suit with costs to the Defendant/Respondent.
5. Dissatisfied with the said Judgement, the Plaintiff/Applicant filed the instant Notice of Motion Application, seeking a stay of execution of the said Judgement, pending appeal.
6. The Instant Notice of Motion Application is not opposed by the Defendant/Respondent, as he failed to file any response to the application and or any written submissions
7. The Court directed the Plaintiff/Applicant to file written submissions, which are summarized as follows; -

The Applicant/intended Appellant's Submissions

8. Vide his written submissions dated 17th September 2024, filed through the Law Firm of Kiarie Joshua & Co Advocates, the Plaintiff/ Applicant submitted that he filed a Notice of Appeal dated 16th May 2024, against this court's Judgment dated 9th May 2023. It was his further submission that the Defendant/Respondent is likely to execute this Court's said Judgement by disposing of the suit property to third parties, which action would prejudice the Applicant's appeal.
9. Reliance was placed on the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as read together with Section 1B of the Civil Procedure Act, which provides for the "Overriding Objective" of the Act, to buttress his argument that the grant of a stay of execution falls within the jurisdiction of the Court; Further, that the Court in considering Applications for stay of execution must balance between the interests of the parties before it.
10. Further reliance was sought in the holding of the Court in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR for a definition of what constitutes "substantial loss" in the context of an Application for stay of execution.
11. The Applicant also relied in the decision of the Court in RWW Vs EKW [2019] eKLR, in support of the proposition that the purpose of a stay of execution is to preserve the subject-matter in dispute, so that if the Applicant's appeal is successful, is not rendered nugatory.
12. The Applicant further submitted that following delivery of this Court's Judgment on 9th May, 2024, the Defendant/ Respondent is at liberty to deal with the suit land as he deems fit, and he may elect to dispose the said land to third parties, which action would leave the Applicant and his family homeless and destitutes. Further, that the Applicant filed the instant Application timeously on 17th May 2024, as the decision sought to be stayed was rendered on 9th May 2024.



13. This court has carefully read and considered the instant Application, the whole proceedings herein, the Judgement sought to be stayed, the written submissions, cited authorities and the relevant provisions of laws and frames the issues for determination as follows; -

- I. Whether the Plaintiff/Applicant is entitled to the Order sought.
- II. Who shall bear the costs of this Application?

Whether the Plaintiff/Applicant is entitled to the orders sought.

14. The Court heard and determined the dispute between the parties herein and therefore, it is well-acquainted with the facts of the case. The principles upon which this Court may grant stay of execution pending appeal are set out under Order 42 Rule 6(2)(a) and (b) of the Civil Procedure Rules, which states 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.”

15. This Court will make reference to the finding of Superior Court in the case of Luxus woods (K) Limited vs Patrick Amugure Kamadi [2016] eklr relied on M/S Portreizt Maternity vs James Karanja Kabia Civil Appeal No.6 of 1997, which observed that the Court needs to strike a balance between the interests of the Decree-holder, and the Judgment-Debtor, when presented with an Application for stay of execution:

“The right of appeal must be balanced against an equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.”

16. It is trite that Applicants seeking stay of execution need to provide sufficient cause as to why the Court should allow their prayers. In the case of Antoine Ndiaye vs African Virtual University (2015) eklr, the Court understood the meaning and import of “sufficient cause” in the following terms:

“... stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the Court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules.”

17. Further, it is also trite that the Court is vested with the discretion on whether to grant or disallow an application for stay of execution of its own Judgment, and the Court exercises such discretion in conformity with certain parameters. In the case of Butt vs Rent Restriction Tribunal (1982) KLR, the Court provided detailed guidance on how discretion should be exercised in an application such as the present one:

1. . The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.



2. The general principle in 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.
 3. A judge should not refuse a stay if there are good grounds for granting it, merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. 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 for costs as ordered will cause the order for stay of execution to lapse.”
18. The primary purpose of a stay of execution is to preserve the status quo pending the hearing of an Appeal, so that the appeal, if successful, is not rendered nugatory. In the case of *RWW Vs EKW* [2019] eklr, the Court reasoned as follows:
- “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 the success of a 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.”
19. The first issue of concern by the Court is whether the instant Application was brought without undue or inordinate delay. The decision sought to be stayed was delivered on 9th May 2024, and the Applicant lodged the instant Application on 17th May 2024. Therefore, it is evident that the Application before this Court was instituted timeously.
 20. Secondly, the Court needs to be satisfied that the Applicant has presented a “sufficient cause” for seeking a stay of execution. In its Judgment dated 9th May 2024, the Court recorded that the Defendant/Respondent is a person of advanced age, and was sued by the Plaintiff/Applicant, who is his son. During the trial, it emerged that the Plaintiff/ Applicant, alongside his siblings, is a beneficiary of a portion of the suit property, which parcel was allocated to him by the Defendant/Respondent out of generosity or fatherly-love. Further, the Plaintiff/Applicant has established his homestead and raised his own family on the abovementioned portion of the suit property.
 21. In light of the Defendant/Respondent's past conduct of apportioning sections of the suit land to the Plaintiff/Applicant, and his siblings, the Court is not persuaded by the Applicant's allegation that the Defendant/ Respondent is about to dispose off that part of the suit land currently occupied by the Plaintiff/ Applicant herein, thereby rendering the Applicant and his family destitutes, and homeless.
 22. Further, this court has considered the Judgement of this court that is sought to be stayed. In the final analysis of the said Judgement, the court dismissed the Plaintiff/Applicant Originating Summons, and thus the said dismissal of the Originating Summons was a negative order. So for a negative order, what



is to be stayed? It is trite that a court cannot stay a negative orders, as there is nothing to stay. See the case of Raymond M. Omboga v Austine Pyan Maranga Kisii HCCA No 15 of 2010, the court held that;

“The order dismissing the application is in the nature of a negative order, and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order...The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court, and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory do not arise...”

23. The upshot of the above therefore is the finding and holding of this Court that the Plaintiff/Applicant has failed to demonstrate sufficient cause as to why a stay of execution should be granted as prayed, and that the dismissal of his suit being a negative order, there is nothing to be stayed.

24. In regard to the issue of substantial loss, it is the Applicant’s obligation in the instant application to establish that he will suffer substantial loss if the orders sought are not granted. In the case of Machira t/a Machira & Co. Advocates v East African Standard (No 2) (2002) KLR 63, the Court of Appeal considered what amounts to “substantial loss” 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 CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the 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.”

25. In the instant Application, the Applicant was required to demonstrate that he stands to suffer substantial loss if this Application is disallowed. The Respondent did not oppose the instant Application. However, the fact that the Application was unopposed does not relieve the Applicant of the legal duty to prove by means of evidence that he is entitled to the Orders sought. See the provisions of Section 107, 109 and 112 of the *Evidence Act*. Upon considering the material and submissions placed before the Court in support of the instant Application, the Court holds and finds that the Applicant has failed to demonstrate that he stands to suffer substantial loss if the prayers sought in the Application herein are not granted.

26. The Court next turns to the question of security for performance of the Decree which the Applicant has sought to be stayed. In the case of Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates (2014) eklr, the Court addressed the subject of security in an application for stay of execution as follows:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure



Rules acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”

27. In this Application, the Applicant did not offer security for the performance of the Decree, which he prays to be stayed. The Court is empowered pursuant to the provisions of Order 42 Rule 6(2) (b) of the Civil Procedure Rules to order the Applicant to provide such security for the performance of the Orders sought to be stayed.
28. The Plaintiff/Applicant having failed to fulfill the two crucial conditions being “sufficient cause” and “substantial loss” as outlined above, the Court is not moved to exercise its discretion to direct that the Plaintiff/Applicant do provide security for the Decree sought to be stayed.
29. Having considered and analyzed the instant application as above, this court finds that the Applicant herein is not deserving of the orders sought. Accordingly, the instant Application is found unmerited as the same does not entirely satisfy all the requirements of Order 42 rule 6 (2)(a)(b).
30. On the issue of costs, the Court recognizes that the Application was not opposed and therefore makes no orders as to costs and directs that the Plaintiff/Applicant to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 31ST DAY OF OCTOBER, 2024

L. Gacheru

Judge

31/10/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant

Mr. Kimani H/B for M/s Musyoka for Plaintiff/Applicant

N/A for Defendant/Respondent

L. GACHERU

JUDGE

31/10/2024.

