



REPUBLIC OF KENYA



**Solomon v Solomon & 3 others (Environment and Land Appeal
E011 of 2024) [2024] KEELC 7038 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7038 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT AND LAND APPEAL E011 OF 2024
A KANIARU, J
OCTOBER 23, 2024**

BETWEEN

EVANSON NYAGA SOLOMON APPELLANT

AND

BEDAN NJERU SOLOMON 1ST RESPONDENT

JEFITHA NJERU SOLOMON 2ND RESPONDENT

ENOSH NJERU SOLOMON 3RD RESPONDENT

MARGARET WANJAGI SOLOMON 4TH RESPONDENT

RULING

1. Before me for determination is a motion on notice dated 08.04.2024 filed under a Certificate of Urgency. It is expressed to be brought under Section 3A of the *Civil Procedure Act*, Order 22 rule 22, Order 42 rule 6 and order 51 rule 1 of the Civil Procedure Rules. The applicant is Evanson Nyaga Solomon and he is also the appellant. He is seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to stay execution of the judgment and decree arising from Runyenjes ELC No. 19 of 2018 pending the hearing and determination of the applicant's ELC Appeal No. E011 of 2024.
 4. That as a condition for stay of execution pending the hearing and determination of ELC Appeal No. E011 of 2024 the appellant/applicant is hereby ordered to provide/give security as the court may direct.
 5. That costs of this application abide the outcome of the appeal.



2. The application is premised on the grounds set out on it and on the applicant's supporting affidavit sworn on 08.04.2024 which states that judgement was delivered in Runyenjes ELC No. 19 of 2018 in favour of the respondents in respect of his land parcel No. Kyeni/Mufu/717. He was aggrieved by the judgement and filed an appeal - ELCLA No. E011 of 2014. That on 05.04.2024 the respondents invaded the suit land with goons and purportedly subdivided the land and in the course of the said subdivision caused a lot of damage to the land by cutting down trees and damaging crops. They also threatened to evict him and his family. He is apprehensive that if the orders sought are not granted, his appeal will be rendered nugatory and he will suffer irreparable damage. He is ready to deposit any security as may be ordered by court.
3. The respondents opposed the application by way of a replying affidavit sworn on 17.04.2024. They deposed inter alia that the applicant is their blood brother and holds the land parcel Kyeni/Mufu/717 as a trustee, not as the sole owner. That the land in question is ancestral and was registered under the applicant's name in 1961 while he was still a student on the understanding that he would hold it in trust for the family. They argued that the appeal presented by the applicant does not have a chance of success and is primarily aimed at delaying their rightful access to the land. They asked the court to deny the applicant's request for a stay of execution, as granting such an order would unfairly disadvantage them and prevent them from using and cultivating the land. It was urged that the application be dismissed.
4. The application was canvassed by way of written submissions. The applicant submitted that Order 42 Rule 6 (1), (2) of the Civil Procedure Rules provides that for a stay of execution to be granted, the applicant must satisfy the following: The court must be satisfied that substantial loss may result to the applicant unless the stay is granted. The application must be made without delay. The applicant must furnish security as the court may direct. The case of Peter Nakupang Lowar v Nautu Lowar [2022] Eklr citing Halal & Another v Thornton & Turpin (1963) Ltd [1990] Eklr was proffered in support of that position.
5. It was submitted that the applicant filed both the appeal and the application for stay of execution expeditiously on 08.04.2024, that is only six days after the judgment. And so there was no inordinate delay. That the substantive matter in issue involves land parcel no. Kyeni/Mufu/717, where the applicant and his family reside. That the lower court's judgment ordered subdivision of the land among the eight respondents, and the respondents have already invaded the land and damaged property. It was submitted that the applicant as the registered owner should be given an opportunity to exercise his constitutional right to appeal by being granted the stay orders in order that his appeal will not be rendered nugatory. It was submitted further that the applicant has complied with the court's requirement for security by depositing Kshs. 100,000 for the due performance of the decree. The case of Geoffery Muriungi & another v John Rukunga M'imonyo suing as the legal representative of the estate of Kinoti Simon Rukunga (Deceased) (2016) Eklr was further proffered in support of the submissions.
6. The Respondents on the other hand submitted that the application for stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. They state that for the stay to be granted, the Applicant must show that substantial loss will occur if the stay is not granted and that the appeal will be rendered nugatory. They argue that they stand to suffer substantial loss and irreparable harm if orders for stay are issued. They rejected the applicant's allegations of land invasion on 05.04.2024 asserting that there is no proof of damage to crops or trees. They stressed that they, as co-owners and family members, have equal rights to the land. Denying them access to the land through a stay would tip the balance of rights unfairly in favor of the applicant. They urged that the application be dismissed with costs.



7. I have considered the application, the response made to it, and the rival submissions. The issue for determination is whether the applicant is entitled to orders of stay of execution pending appeal.
8. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the Civil Procedure Rules, 2010 which provides as follows: -
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 - (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
9. The power to grant stay of execution is discretionary and in order for an applicant to succeed in an application for stay of execution, he must first satisfy the court that substantial loss may result to him unless the stay is granted. He also needs to show that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
10. The applicant argues that he is the registered owner of the suit land where he resides with his family. He expressed that the lower court's judgment ordered subdivision of the land among the eight respondents, and the respondents already invaded the land damaging property. That was however denied by the respondents. The respondents argue that they have equal rights to the land as family members. From the material before me and the passionate arguments given by both parties, I am persuaded that the applicants' fears that the respondents may continue to cause more damage to the property or evict him from the suit land might be justified. He is entitled to an opportunity to have his appeal heard. An order for stay is therefore appropriate in the circumstances so as not to render the appeal nugatory.
11. Further, judgment in this case was delivered on 02.04.2024, and the applicant filed the present application on 08.04.2024, that is within six days. I am satisfied that the application was filed without unreasonable delay.



12. On the issue of security, this court had made directions earlier that the applicant deposit security in the sum of Kshs. 100,000/=. The applicant complied. This court is persuaded that the same security is sufficient in the circumstances.
13. The upshot of the foregoing is that I find that the applicant has demonstrated that he is entitled to orders of stay of execution pending appeal. I hereby allow the notice of motion dated 08.04.2024 in its entirety. The security already given will continue to serve as security for costs.
14. Costs of the application shall abide the outcome of the appeal.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 23RD DAY OF OCTOBER, 2024.

A. KANIARU

JUDGE – ELC, EMBU

In the presence of

Githinji Ithiga for Njeru Ithiga for appellant.

Respondent present in person.

Court Assistant - Leadys

