



**Mutuku v Karugah (Environment and Land Appeal E034 of 2024)
[2024] KEELC 6907 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6907 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E034 OF 2024
LN GACHERU, J
OCTOBER 17, 2024**

BETWEEN

JOHNSON MACHAKO MUTUKU APPELLANT

AND

SYMON MWANGI KARUGAH RESPONDENT

*(Being an Appeal against the Judgment of Hon. S. Mwangi in
Murang'a CMC ELC Case No. 139 of 2018 Delivered on 3rd July, 2024.)*

RULING

1. Vide a Notice of Motion Application brought under Certificate of Urgency dated 5th August 2024, and premised under Order 42, Rule 1, of the Civil Procedure Rules, the Appellant/Applicant sought for following Orders:
 1. That Court be pleased to stay execution of the judgment delivered on 3rd July, 2024, in the lower Court pending the hearing and determination of ELCA Appeal No. E034 of 2024 – Muranga, to preserve the subject-matter in dispute Kakuzi/kirimiri/Block 8/928, so that the right of the Appellant/ Applicant, who is exercising the undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.
 2. The costs of this Application be provided for.
2. The Application is anchored on the grounds stated thereof and on the Supporting Affidavit of Johnson Machako Mutuku (the Appellant/Applicant herein), sworn on 5th August, 2024. It is the Appellant/Applicant's case that he was the Defendant in Murang'a CMCC ELC Case NO.39 of 2018, wherein, Judgment was delivered on 3rd July, 2024.
3. He averred that he was dissatisfied with the said Judgment, and he lodged the instant Appeal against the said decision. It was his further averments that he instructed his Advocates on record to apply



for a stay of execution of the Judgment of the trial Court within 30 days of the delivery of the same. However, the trial Court dismissed his Application for stay of execution.

4. He further averred that the Respondent is ready and has threatened to execute the Judgment of the trial Court, which would render the instant Appeal nugatory. He urged this Court to grant a stay of execution of the trial Court's decision dated 3rd July, 2023, in order to preserve the subject-matter in dispute and to safeguard his right of appeal.
5. Further, the Appellant/ Applicant attached a Memorandum of Appeal dated 26th July, 2024, in support of his Application, wherein he set out ten (10) grounds against the trial Court's decision dated 3rd July, 2023.

The Respondent's Response

6. The Application is opposed by the Respondent through his Relying Affidavit sworn on 19th September, 2024. He contended that the instant Application has been brought after an unreasonable delay, and which delay has not been explained by the Applicant. Further, that the instant Application is an afterthought, and is intended to frustrate the execution of the Decree of the trial Court.
7. The Respondent faulted the Appellant/Applicant's for failure to offer security for the performance of the Decree of the trial Court in the event the instant Appeal is not successful. Further, that he has already engaged the services of an Auctioneer for the purpose of evicting the Appellant/ Applicant from the suit property, and the said Auctioneer has raised an Invoice for the amount of Kshs.800,000/=, (eight hundred thousand), being the costs of evicting the Appellant/ Applicant from the suit land.
8. He urged the Court to issue a directive to the Appellant/ Applicant to deposit the sum of Kshs.800,000/= (eight hundred thousand), within a certain period of time as a condition for the grant of stay orders, being the security for the due performance of the trial Court's Decree.
9. It was the Respondent's further averment that the instant Application does not disclose any credible grounds of Appeal warranting a reversal of the decision of the trial Court. He urged the Court to dismiss the instant Application with costs.
10. The Application was canvassed by way of written submissions, which the court summarizes as below; -

The Appellant/applicant's Submissions

11. The Appellant/Applicant filed his written submissions dated 24th September 2024, through the Law Firm of T.M. Njoroge Advocate., and submitted that he lodged his appeal timely, against the decision of the trial Court. It was his further submission that if the Orders sought in the instant Application are allowed, the Respondent will not be prejudiced in any way, and further argued that in the event the Orders sought are not granted, the Respondent will proceed to execute the Judgment of the trial Court therein, infringing his right to property.
12. The Appellant/Applicant further submitted that the purpose of a stay of execution is to preserve the subject-matter of the dispute before the Court, while at the same time balancing the interests of the parties to the suit, and considering the particular circumstances of each case. Reliance was sought in the holding of the Court in the case of RWW V EKW (2019) eKLR, where the court held;

“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.

13. Further, the Appellant/ Applicant submitted that he has lived on the suit property for the last 40 years, and he has no other place to call home, and that due to his long stay on the suit property, he is entitled to the said parcel of land, pursuant to the doctrine of Adverse Possession, and the Respondent's title has become extinguished.
14. The Appellant/Applicant expressed willingness to provide security for the Judgment appealed against if required by this Court to do so. It was further submitted that the Respondent will not be prejudiced in the event no security is given, and the Application for stay of execution is allowed. He urged the court to grant an Order for status quo ante to be maintained pending the hearing of his appeal.

The Respondent's Submissions

15. The Respondent filed his written submissions dated 20th September 2024, through the Law Firm of Jese Kariuki & Co Advocates. He identified two (2) issues for determination as follows:
 - 1). Whether there should be a stay of execution of the Judgment entered on 3rd July 2024 and the trial Court's Orders stayed pending the hearing and determination of Murang'a ELCA Appeal No. E034 of 2024.
 - 2). Who shall pay the costs?
16. Reliance was placed on the provisions of Order 42 Rule 6 (1) (2) of the Civil Procedure Rules, and also on the decision of the Court in the case of Halal & Another V Thornton & Turpin [1963] Ltd [1990] eKLR; COI & Another V Chief Magistrate Ukunda Law Courts & 4 others [2018] eKLR; RWW v EKW (2019) eKLR; and, Butt v Rent Restrictions Tribunal [1982] KLR 417.
17. The Respondent further submitted that the instant Application is an afterthought, having been commenced following an unreasonable and unexplained delay, and is only meant to frustrate the execution of the Decree of the trial Court. Further, that the Appellant/Applicant has not offered any security for the Decree should the Appeal be unsuccessful, which is a mandatory condition pursuant to the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010, which provides;

“ 6. Stay in case of appeal [Order 42, rule 6.]

 - (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.”
18. Reliance was also placed on the holding of the Court in the cases of Aron C. Sharma Raikundalia T/ A Rairundalia & Co. Advocates; [*Yamko Yadpaz Industries Limited V Kalka Flowers Limited Nairobi HCCC No. 591 of 2012*](#); Machira T/A Machira & Co. Advocates to anchor the foregoing proposition, where the court held;

“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. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. Civil process is quite different because, in a 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 the 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.”

19. He further submitted that the Appellant/ Applicant has not displayed any credible grounds of Appeal to warrant a reversal of the trial Court’s Decree. Reliance was placed in the case of Halal & Another - vs- Thornton & Turpin [1963] Ltd [1990] eKLR, (Gicheru JA, Chesoni & Cockar Ag. JA) held that;

“...thus the superior Court’s discretion is fettered by three conditions. Firstly, the Applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the Applicant must furnish security. The application must of course, be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of Hassan Guyo Wakalo -vs- Straman EA Ltd (2013) as follows:

“In addition the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”

These two principles go hand in hand and failure to prove one dislodges the other.”

20. He reiterated the claim that his duly-appointed Auctioneer has issued an invoice for the sum of Kshs.800,000/=, being the costs of executing the trial Court’s Decree to evict the Appellant/ Applicant from the suit property. He urged the Court to issue a directive requiring the Applicant to deposit the said amount as a condition for the granting of a stay of execution as sought, being the security for the due performance of the trial Court’s Decree.
21. On the issue of costs, the Respondent sought reliance in the provisions of Section 27 of the *Civil Procedure Act*, to anchor the argument that costs of a suit is a discretionary award which is awarded to the successful party.
22. Further reliance was sought in the decision of the Court in the cases of IEBC V Mutula Kilonzo & 2 Others (2013) eKLR; Republic V Rosemary Wairimu Munene (Ex-parte applicant) V Ihuru Dairy Farmers Cooperative Society Ltd (Judicial Review Application No.6 of 2004; Cecilia Karuru Ngayu V Barclays Bank of Kenya & Another [2016] eKLR; Reid, Hewitt & Co Ltd V Joseph AIR 1918 Cal 717; Myers V Defries (1880) 5 Ex D 180; and, Zesta Engineering Ltd V Cloutier (2002) O.J. No. 4495 (C.A.) (QL).
23. The Respondent urged the court to dismiss the instant Application with costs as it lacks merit.
24. The court has considered the instant Application, the annexures, thereto and the rival written submissions and finds the issues for determination are: -,
- i. Whether the Appellant/Applicant is entitled to the Orders sought?
 - ii. Who shall bear the costs of the Application?



Whether the Appellant/Applicant is entitled to the Orders sought?

25. The main issue for determination in the instant Application is whether the Appellant/Applicant's Application for stay of execution of the trial Court's Judgment and all consequential Orders thereto has been brought without unreasonable delay, and whether the prayers sought are merited.

26. Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 provides as follows:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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 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.”

27. It is trite that the Court is imbued with the discretion to either grant or disallow a prayer seeking a stay of execution of a Judgment. In the case of *Butt Vs Rent Restrictions Tribunal* [1982] KLR 417, the Court held as follows:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings.

It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459.”

28. Similarly, in the case of *Antoine Ndiaye v African Virtual University (Civil Suit 422 of 2006)* [2015] KEHC 6783 (KLR) (Commercial and Tax) (9 February 2015) (Ruling), the Court reasoned as follows:

“The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, 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.”

29. The instant Application was instituted by the Appellant/ Applicant on 5th August, 2024. The decision of the trial Court which the Appellant/ Applicant has appealed against was entered on 3rd July, 2024. Thirty-two (32) days separate the issuance of the trial Court’s decision and the lodging of the application for stay of execution of the trial Court’s decision.
30. This Court has noted that the Appellant/Applicant changed his Advocates for purposes of the filing the instant Appeal. The Court is alive to the fact that the Appellant’s new Advocates required some time to familiarize themselves with the proceedings and Judgment of the trial Court in order to prepare an Appeal against the said Judgement.
31. Therefore, this Court is persuaded that the lapse of the 32-days period between the delivery of the trial Court’s Judgment, and the lodging of the instant Application does not amount to inordinate and/or unreasonable delay, considering the circumstances of this case, and particularly the change of Advocates by the Appellant/ Applicant.
33. On the issue of “substantial loss” which the Appellant/ Applicant is likely to suffer if his prayer for stay of execution is disallowed, the court will rely in the case of *RWW v EKW (Civil Suit 25 of 2012)* [2019] KEHC 6523 (KLR) (Civ) (21 June 2019) (Ruling), where the Court proclaimed 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.”
34. Further, in the case of *James Wangalwa & another v Agnes Naliaka Cheseto Misc Application No 42 of 2011 [2012] eKLR*, the Court understood the meaning and import of “substantial loss” in relation to a stay of execution 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.”
35. This Court has considered the trial Court’s reasoning in its Judgement, and the said consideration is important in order to determine whether the Appellant/Applicant stands to suffer substantial loss, and which cannot be compensated by an award of damages, should his Appeal succeed
36. In the proceedings before the trial Court, the Appellant/Applicant was the Defendant wherein he had filed a Counter-Claim against the Plaintiff (the Respondent herein), and claimed ownership of land parcel number Kakuzi/kirimiri/Block 8/928 (the suit property), on the basis of the doctrine of Adverse Possession.



36. The trial Court found in favour of the Plaintiff (Respondent herein), on grounds that his rights as the registered owner of the suit land pursuant to Section 26 of the Land Act No. 6 of 2012, were not extinguished by the Appellant/ Applicant herein for the reason that the Applicant (as Defendant thereon), had not resided on the suit land for the Statutory period of 12 years in order to be entitled to the said parcel of land by virtue of the doctrine of Adverse Possession.
37. The trial Court held that the Appellant/ Applicant's claim could only crystalize sometimes in late 2027, because the evidence adduced at the trial showed that the Appellant/Applicant was not residing on the suit property as at 26th September 2015.
38. Having examined the issues in contention in the suit before the trial Court, the Court holds and finds that an award of damages would not be adequate to compensate the Appellant/Applicant in the event that his Appeal is successful, because his claim over the suit property was founded on the doctrine of Adverse Possession.
39. The final issue for consideration concerns whether the Appellant/ Applicant has provided security for the performance of the trial Court's Decree. The Applicant submitted that he is willing to provide security if called upon by the Court to do so. On his part, the Respondent claimed that he is in receipt of an Invoice from his duly-appointed Auctioneers who are demanding the sum of Kshs.800,000/=, being the costs of evicting the Appellant/ Applicant from the suit property as per the trial Court's directive.
40. The Court has perused the Invoice dated 20th August 2024, addressed to the Applicant's Advocates by the firm of Icon Auctioneers, which invoice is annexed to the Respondent's Replying Affidavit dated 19th September, 2024. The Court is therefore persuaded that pursuant to the requirements of Section 107, of the Evidence Act, the Respondent has provided sufficient evidence attesting to his claim that his appointed Auctioneers have issued a demand of Kshs.800,000/=, being the costs of evicting the Appellant/ Applicant from the suit land in line with the trial Court's holding.
41. In the circumstances, as a condition for allowing the Applicant's prayer for a stay of execution of the trial Court's Judgement and Decree, the Court hereby directs the Appellant/Applicant to deposit some amount of money as Security, bearing in mind that such security is to guarantee the due performance of such decree or Order that my ultimately be binding, and it is not supposed to be a punishment. See the case of Aron C. Sharma vs Ashana (supra)
42. Further, as the court directs the Appellant Applicant to deposit security in Court, being security for the Performance of the said Decree, it will bear in mind that it has no limit or restriction in ordering for such security, and also considers that this discretion is intended to be exercised so as to avoid injustice or hardship, while also balancing the right of the parties herein. See the case of Yamko Yadpaz industries ltd(supra).
43. For the above reason, the Court directs that the Appellant/ Applicant deposits ksh 100,000/= in court as Security, as a condition for grant of stay of execution. Consequently, the court finds the Appellant/ Applicant's Notice of Motion Application dated 5th August 2024, is merited.
44. The said Application is allowed in terms of prayer No 2, with a condition that the Appellant/Applicant deposits in Court ksh 100,000/= as Security, within period of 15 days from the date hereof. Failure to deposit the said security, the Stay orders issued herein will automatically lapse.
45. On the issue of costs, the Court finds that costs do follows the event, but it is granted at the discretion of the Court. Consequently, this court finds that costs herein shall be in the cause.



46 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 17TH DAY OF OCTOBER 2024.

L. GACHERU

JUDGE

17/10/2024

Delivered online in the presence of:

Joel Njonjo – Court Assistant.

Appellant/Applicant – Absent

M/s Kiarie H/B for Mr. Jessee Kariuki for the Respondent

L. GACHERU

JUDGE

17/10/2024

