



**Mwiiri v Mbugua & another (Environment and Land Appeal
E070 of 2024) [2024] KEELC 13457 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E070 OF 2024**

JG KEMEI, J

NOVEMBER 22, 2024

BETWEEN

DAVID MWAURA MWIIRI APPELLANT

AND

MARY WATIRE MBUGUA 1ST RESPONDENT

PAULINE NYAIRURU MUNGA 2ND RESPONDENT

RULING

1. The Appellant/Applicant' filed the instant Notice of Motion Application dated 23/7/24 expressed under Sections 1A, 1B, 3A, 63(e), & 79G of the *Civil Procedure Act* and Order 42 Rule 6 (1), Order 45 and Order 51 rule 1 of the *Civil Procedure Rules* craving Orders That; -
 - a. Spent.
 - b. Spent
 - c. This Hon Court be pleased to grant stay of execution of the Ruling and orders dated the 11/7/24 delivered in MC.CC/110 of 2015 pending the hearing and determination of the appeal
 - d. The Court be pleased to give further orders and or directions as shall preserve the set circumstances in such a way that this Application will not be rendered nugatory
 - e. Costs to be borne by the 2nd Respondent.
2. The Application is based on grounds thereat which are restated in the Supporting Affidavit of David Mwaura Mwiiri, the Applicant.
3. He gave a detailed history of the acquisition of the suit land as he purchased the suit land from the 1st Respondent vide an agreement of sale dated the 5/14/2013 and took possession of the same



and commenced developments and applied for connection of power to the suit land; that the 1st Respondent refused to transfer the land to him and he filed suit in ELC 110 of 2015 in Kikuyu seeking specific performance of the sale agreement aforesaid against the 1st Respondent; the 1st Respondent failed to file defence or enter appearance in the said suit; the Court allowed the claim and adjudged him as owner of the suit land vide a Court order issued on 4/2/2020; vide the orders dated the 10/9/2019 the Court directed the Executive Officer of the Court to execute the documents necessary to effectuate the orders of the Court delivered on the 25/1/2018 culminating in the registration of the title in his name on the 4/1/2022.

4. Aggrieved by the said judgment the 2nd Respondent moved the Court vide the Notice of Motion of 31/1/2024 seeking orders inter alia stay of execution of the judgement and decree of the Court issued on the 10/9/2019, setting aside the judgement and all its consequential orders, enjoin the 2nd Respondent, 2nd Respondent was allowed to file defence and Counterclaim, the registration of the title in his name was cancelled and the suit land reverted to the 1st Respondent, the original owner herein.
5. The Court vide its Ruling delivered on the 11/7/24 allowed the 2nd Respondent's Application in its entirety.
6. Aggrieved by the said decision of the Court, the Applicant moved the Court and filed the instant Application alongside the Memorandum of Appeal of 23/7/24 seeking in the main that the Ruling of the Court dated the 11/7/24 be and set aside with orders dismissing the 2nd Respondent's Notice of Motion dated the 31/1/2024.
7. The Applicant *inter alia* averred that the orders of the Court of 11/7/24 cancelled the title in his name and bestowed ownership to the suit land to the 2nd Respondent in an interlocutory stage which orders are final in nature. That as such he is facing eminent eviction. That the appeal has good chances of success and that if the Application is not granted his appeal stands to be rendered nugatory
8. The 1st Respondent did not oppose the Application.
9. The 2nd Respondent vide Replying Affidavit dated the 11/9/24 contended that the Application has been overtaken by events given that the impugned orders of the Court have been implemented. Inter alia it was further contended that the Applicant has no arguable appeal given its argumentative stance and does not point to any single error by the Learned Magistrate. That in any event the Applicant shall be afforded the chance to be heard when the case is fixed for rehearing and as such his claim that final orders have been issued do not reflect the correct interpretation of the Courts orders.
10. Save for the Applicant, none of the other parties filed any written submissions despite having taken directions to do so. I have perused the submissions on record.
11. The key issue for determination is whether the Application is merited and who meets the costs thereof.
12. The legal provisions for stay of execution pending appeal are anchored in Order 42 rule 6 (1) & (2) of the [Civil Procedure Rules](#) that;-

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

13. The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 the Court of Appeal gave guidance on how a Court should exercise discretion in an Application for stay of execution and held that: -

- “1. The power of the Court to grant or refusal an Application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle is 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. (sic) (trial Court judgement).
3. A judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
4. 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 of costs as ordered with cause the order for stay of execution to lapse.”

14. Have the Applicants satisfied the conditions set on Order 42 rule 6 (2) of the *Civil Procedure Rules* above? The Applicants case as I gather is that the orders issued by the Court have final ramifications given that it ordered for the cancellation of the title registered in his name and the same be registered in the name of the 2nd Respondent. I have keenly perused the said orders and find that the Applicant has misled the Court that the title was cancelled and it reverted to the 1st Respondent. It is becoming clear that the Applicant and the 2nd Respondent purchased land from the 1st Respondent and the issue then will be who has a better title. This is a matter that is best left to the Court to determine.

15. It is trite that the purpose of an Application for stay of execution pending appeal is to preserve the subject matter of the suit in dispute so that the rights of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

16. The Court is therefore called upon to weigh the right against the successful litigant who should not be deprived of the fruits of the judgement and ensure that no party suffers prejudice that cannot be compensated by an award of costs. See the case of *RWW v EKW* (2019) eKLR.



17. The circumstances of this case are rather different. The impact of the orders of the impugned Ruling is to set aside the judgment of the Court in the trial Court and allow the case to be heard afresh with the joinder of the 2nd Respondent. That said it is not lost on the Court that the Applicant having been aggrieved by the said orders has proffered an appeal before the Court which is pending hearing and determination. The Court has perused the Memorandum of Appeal which seeks inter alia that the Court erred in making a final decision at the interlocutory stage without affording him the right to be heard. In this case it cannot be said to be an idle appeal. The 2nd Respondent's argument that there is no prejudice to be suffered by the Applicant at this point given that he will be heard on his claim when the case is heard afresh sounds convincing however, a judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
18. The 2nd Respondent has urged that the orders of the Court which are intended to be stayed have been overtaken by events, however there is no evidence adduced before the Court to show that the title has been cancelled. Save for the receipt and an Application to register the orders, nothing much has been placed before the Court to state otherwise. A copy of the official search of the title ought to have sufficed in that regard. In the absence of any contrary evidence the Court will take that the Application has not been overtaken by events.
19. The Court therefore finds that the Applicant has established substantial loss in the event the Application is not granted.
20. The Court finds that to preserve the subject matter, the Application is allowed as prayed.
21. The costs shall abide the determination of the pending appeal.
22. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22ND DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Omondi HB Kibet for Appellant

Ms. Wanja HB Mugo for the 1st and 2nd Respondents

Court Assistant – Phyllis

