



**Hika & 2 others v Kagwima alias Robert Wairiri (Environment and Land Appeal E012 of 2024) [2024] KEELC 13354 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13354 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND APPEAL E012 OF 2024**

**YM ANGIMA, J  
NOVEMBER 21, 2024**

**BETWEEN**

**SIMON KIMATHI HIKA ..... 1<sup>ST</sup> APPELLANT**

**HARON NJOROGE HIKA ..... 2<sup>ND</sup> APPELLANT**

**DANIEL NJOROGE HIKA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**ROBERT WAIRIRI KAGWIMA ALIAS ROBERT WAIRIRI ..... RESPONDENT**

**RULING**

1. By a notice of motion dated 05.06.2024 expressed to be brought pursuant to Order 22 rule 25, Order 42 rule 6 and Order 51 rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the [Civil Procedure Act](#) and all the other enabling provisions of the law the appellants sought a stay of execution of the judgment and decree of the trial court dated 09.05.2024 in Engineer CM ELC No. E008 of 2023 pending the hearing and determination of the appeal.
2. 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 2<sup>nd</sup> appellant on 05.06.2024 on behalf of all the appellants. It was stated that the appellants being aggrieved by the said judgment of the trial court had filed the instant appeal against it. It was contended that the appellants and their family members had been in occupation of the suit property for several decades and that they stood to suffer substantial loss if they were to be evicted therefrom before the hearing and determination of the appeal. The appellants contended that the application had been filed without unreasonable delay and that it would be in the interest of justice to grant the orders sought.
3. The respondent filed a replying affidavit sworn on 06.08.2024 in opposition to the said application on several grounds. First, it was disputed that the appellants or any of them were in occupation of the suit property hence it was contended that they stood no risk of suffering substantial loss. Second, that the



appellants had not sought any injunctive relief in their counterclaim before the trial court. Third, that he would suffer great prejudice if the stay sought was granted because he would be denied his right to quiet possession of the suit property. As a result, he prayed for dismissal of the said application with costs.

4. The appellants filed a further affidavit sworn by the 2<sup>nd</sup> appellant on 10.11.2024 in which they asserted that they were in actual occupation of the suit property. They stated that they had cultivated various crops on the suit property and they exhibited several photographs of crops they claimed were growing on the suit property. They also asserted that they had buried some of their deceased relatives on the suit property and they exhibited some photographs in a bid to demonstrate the existence of a grave on the property.
5. When the application was listed for inter partes hearing 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 appellants filed written submissions dated 07.10.2024 whereas the respondent's submissions were dated 30.10.2024.
6. The court has considered the appellants' notice of motion dated 05.06.2024, the respondent's replying affidavit in opposition thereto as well as the appellants' further affidavit. The court is of the view that the main question for determination herein is whether the appellants have satisfied the principles for the grant of an order of stay of the judgment and decree of the trial court pending the hearing and determination of the appeal.
7. The principles for either granting or refusing an application for stay of execution are to be found in Order 42 rule 6(2) of the Civil Procedure Rules which stipulates as follows:
  - “(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.”
8. The court has considered the material and submissions on record. The respondent contended that the appellants had failed to prove before the trial court that they were in possession of the suit property. The court has not perused the judgement of the trial court since it would appear that none of the parties exhibited a copy thereof in their respective affidavits. However, it would appear from the memorandum of appeal that some of the issues for determination were whether the appellants had been in possession of the suit property for a period of at least 12 years without interruption and whether or not the trial court had jurisdiction to entertain a claim for adverse possession. Thus, there is no credible evidence on record to support the respondent's allegation.
9. Be that as it may, the court is satisfied on the basis of the appellants' further affidavit and the photographs annexed thereto that the appellants have placed some credible evidence on record that they are in occupation of the suit property or part thereof and that they are undertaking some farming activities thereon. The court is thus of the view that they stand to suffer substantial loss if they and their structures were to be removed from the suit property during the pendency of the appeal. The court is satisfied that it may cause a serious disruption to the appellants' socio-economic activities if they were to be evicted before their pending appeal is heard and determined.



10. The court is further of the view that the appellants' application was filed without unreasonable delay. The material on record shows that the judgment of the trial court was delivered on 09.05.2024 whereas the instant application was filed on 05.06.2024, about 26 days later. The court takes the view that no security is required for due performance of the decree should the appeal ultimately fail because of the nature of the reliefs granted by the trial court. The order of permanent injunction can still be enforced upon conclusion of the appeal.
11. The upshot of the foregoing is that the court finds merit in the appellants' application for stay pending appeal. As a consequence, the notice of motion dated 05.06.2024 is hereby allowed in the following terms:
  - a. There shall be a stay of execution of the judgment and decree of the trial court dated 09.05.2024 in Engineer ELC Case No. E008/2023 for a period of 2 years from the date hereof, or until the hearing and conclusion of the appeal, whichever comes first.
  - b. Costs of the application shall be costs in the appeal.
  - c. The appeal shall be mentioned on 03.02.2025 for directions on the hearing thereof.

It is so decided.

**RULING DATED AND SIGNED AT NYANDARUA THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2024 AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Ms. Onyimbo holding brief for Ms. Njau for the Appellants

Mr. Obore for the Respondent

C/A - Carol

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**Y. M. ANGIMA**

**JUDGE**

