



Njogu (Suing on His Behalf and as a Personal Representative of the Estate of Njoki Godfrey) v Nyaga & another (Environment and Land Appeal E035 of 2024) [2024] KEELC 13371 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E035 OF 2024
JM MUTUNGI, J
NOVEMBER 21, 2024**

BETWEEN

FRANCIS KABORE NJOGU (SUING ON HIS BEHALF AND AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF NJOKI GODFREY) APPELLANT

AND

JUDY MUTHONI NYAGA 1ST RESPONDENT

ZIPPORAH WAGATWE NJOGU 2ND RESPONDENT

RULING

1. The Appellant, vide a Notice of Motion application dated 18/7/2023, prays for the following orders:
 1. Spent
 2. Spent
 3. That there be a stay of execution of decree emanating from the Judgment that was delivered on 21/6/2024 pending the hearing and determination of the Appeal.
 4. That this Honourable Court do issue such further orders or directions that it may deem fit to grant in the interest of Justice.
 - 5.. That the costs of the application be in the cause.
2. The application is premised on the grounds set out on the body of the application and the Supporting Affidavit of the Applicant. The Applicant avers that the Respondents initiated a case in the Gichugu Magistrate’s Court being ELC No. 28 of 2021, seeking eviction orders against the Appellant from the land parcel identified as Kabare/Nyagithuci/154. Judgment in the case was delivered in favour of the Respondents and the Appellant was ordered to vacate from the land within 60 days from the date of



Judgment failing which eviction would issue. The Appellant has appealed against the Judgment and has filed the instant application praying for a stay of execution of the Judgment/decree. He further averred that his family's residence is on the property meaning that eviction would leave them without a home. He argues that these circumstances justify the Court to grant the orders prayed for.

3. In her Replying Affidavit filed on 30th September 2024, the 2nd Respondent contended that the Appellant's application was an attempt not only to unjustly benefit at her expense but also to extend his unauthorized occupation and encroachment of the disputed property. The Respondent deponed that the Appellant was deceiving the court that he and his family resided on the disputed property while the reality was that, he and his family lived on a different parcel of land, namely Kabare/Nyagithuci/158 which was awarded to the Appellant pursuant to Succession proceedings in Kerugoya HC Succession Cause No. 293 of 2000 where also land parcel Kabare/Nyagithuci/154 was allocated and registered jointly in the names of Ziporah Wagate Njogu Njoki Godfrey and Judith Muthoni Nyaga as per the exhibited copy of certificate of Confirmation of Grant.
4. The 2nd Respondent averred that Godfrey Njogu Mburia (deceased) who was the registered owner of land parcel Kabare/Nyagithuci/39 had during his lifetime subdivided the land into five equal portions namely Kabare/Nyagithuci/154, 155, 156, 157 and 158 and had directed how the parcels were to be distributed upon his demise. Each of the sons were allocated a portion and the Appellant/Applicant was allocated land parcel Kabare/Nyagithuci/158 where he has his homestead. The 2nd Respondent and Njoki Njogu (Appellant's mother) were to have a life interest in land parcel Kabare/Nyagithuci/154 whereupon it would devolve to the 1st Respondent, the Appellant's sister. The 2nd Respondent averred that the arrangement was agreed upon by all parties including the Appellant resulting in the distribution ordered in the succession cause. The Respondents thus argue, the Appellant has no basis to seek stay of execution of the Lower Court Judgment as he cannot demonstrate the substantial loss he stands to suffer if stay is not granted. The Respondents stated the disputed suit property was ancestral land and they had no intention to dispose of the same.
5. On 10th March 2024, the parties indicated to the Court that they would rely on the application and the Affidavit sworn in response and would file no written submissions and invited the Court to render its Ruling on the basis of the material before it and the record.
6. The principles that govern the grant of a stay of execution pending appeal are well settled. Order 42 Rule 6(2) of the Civil Procedures Rules provides as follows:

“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.
7. Further to the above, a stay may also be granted for sufficient cause, and in regard to that, Courts are now enjoined to give effect to the overriding objective in the exercise of their powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions, with the objective of doing justice in the matter and/or the parties.
8. To succeed in an application for a stay of execution, the applicant must demonstrate three key elements: first, a likelihood of suffering substantial loss if the stay is not granted; second, that the application for the stay was made promptly, without unreasonable delay; and third, the applicant must comply with



any security requirements the Court may impose to ensure the performance of the decree or order that may ultimately be binding on the Applicant. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.

9. As to what substantial loss is, the Court in the Case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, stated 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.”

10. The Court, in the Case of *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, and held 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. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

11. That the Appellant/applicant was allocated land parcel Kabare/Nyagithuci/158 measuring 0.38 Hectares in the succession cause is not in dispute as is confirmed by the certificate of confirmation of Grant issued in Kerugoya HC Succession Cause No. 293 of 2000. It is on this land that the Appellant/Applicant has settled with his family. The Applicant in my view has not demonstrated the substantial loss he would suffer if the stay is not granted. Certainly he would not be rendered destitute as he is already settled in his parcel of land. The primary condition that an Applicant in an application for stay pending appeal must satisfy is that he would suffer substantial loss unless stay of execution is granted. The Applicant has failed to satisfy the Court that he would suffer any substantial loss unless stay is ordered.
12. In the result I find no merit in the application for stay of execution and I dismiss the same with no order for costs.
13. Orders accordingly.

RULING DATED, READ AND DELIVERED VIRTUALLY AT KERUGOYA THIS 21ST DAY OF NOVEMBER 2024

J. M. MUTUNGI

ELC - JUDGE

