



REPUBLIC OF KENYA



**Kimani v Maina & another (Environment & Land Case 149 of 2022)  
[2024] KEELC 13403 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13403 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 149 OF 2022**

**JG KEMEI, J**

**NOVEMBER 19, 2024**

**BETWEEN**

**ALICE NJAMBI KIMANI ..... PLAINTIFF**

**AND**

**SIMON MWANGI MAINA ..... 1<sup>ST</sup> DEFENDANT**

**EDWARD KUBAI WAMAITHA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Motion dated 21/6/2024 premised on Order 42 Rule 6, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 3 and 3A of the *Civil Procedure Act*, the Plaintiff/Applicant seeks in the main an order for stay of execution of the Judgment delivered on 23/5/2024 pending the hearing and determination of Nairobi Court of Appeal No. E466 of 2024.
2. The Application is based on grounds on the face of it which are rehashed in the Supporting Affidavit of even date of Alice Njambi Kimani, the Applicant.
3. Annexing a copy of the impugned Judgment as ANK-01, the Applicant deponed that the Court ordered eviction of all occupants of land parcel number RUIRU/RUIRU EAST BLOCK 2/798 (the suit land) which she occupies. That aggrieved by the said Judgment she had lodged an appeal at Nairobi *CA No. E466 of 2024* as shown by ANK-02; and the copies of the Notice of Appeal and Memorandum of Appeal. That she and other occupants have received eviction threats from the Respondents and unless the orders sought are granted, the appeal would be rendered nugatory. She further deposed that the Respondents and the deceased registered owner of the suit land have never taken possession of the suit land and therefore they will not suffer any prejudice if the application is granted. She expressed her willingness to comply with stay conditions that the Honourable Court may impose.
4. The Application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents only.



5. Simon Mwangi Maina and Edward Kubai Wamaitha jointly swore their Replying Affidavit on 1/8/2024. They averred that no eviction notice has been issued to the occupants of the suit land as alleged. That instead the occupants have voluntarily offered to purchase the respective plots which offer has been accepted by the Respondents as shown by letters marked SMM-1. That the application is only meant to deny them their right to enjoy the fruits of their Judgment and will visit prejudice on them. They urged the Court to dismiss the application with costs.
6. On 10/7/2024 directions were given for parties to prosecute the application by way of written submissions.
7. The Applicant through the firm of Joe Nganga & Associates Advocates filed submissions dated 22/7/2024. The Applicant highlighted on the provisions of Order 42 Rule 6 of the Civil Procedure Rules as the guiding law in an application of this nature. That the Court is further enjoined to consider the overriding objectives as provided under Section 1A of the Civil Procedure Act.
8. On substantial loss, the Applicant posited that she has been in occupation of the suit land since 2006 and she risks eviction resulting from the impugned Judgment which is now the subject of her appeal. 25/6/2024, being one month after delivery of the Judgement herein. Finally with respect to security for due performance of the decree, it was submitted that the Applicant was ready and willing to abide by the orders of this Court.
9. On the other hand, the firm of Nyambura Munyua & Co. Advocates filed submissions dated 3/9/2024 on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. On the issue of the Applicant's claim of substantial loss, they contended that she does not stand to suffer any loss. That she sold plots of the suit land to 16 people without authority or capacity to do so and now the said occupants have offered to purchase the plots from the legitimate owners. That the Applicant does not reside on the suit land and her application is an attempt to deny the Respondents a chance to enjoy the fruits of their Judgment. That the suit land has been a subject of protracted litigation since 1993 (see CMCC No. 676 of 1993). In totality the Respondents maintained that the Applicant has not satisfied the conditions for grant of stay of execution as prayed.
10. The germane issue for determination is whether the Application is merited.
11. 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.”

12. The jurisdiction to grant stay of execution 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 Vs. 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.”

13. Has the Applicant satisfied the conditions set on Order 42 rule 6 (2) of the Civil Procedure Rules above? The Applicant contends that she is on the verge of being evicted from the suit land as the 1<sup>st</sup> and 2<sup>nd</sup> Respondents are intent on executing the Judgement in their favor. This was countered by the Respondents with an answer that the Applicant is not in occupation of the land. This was not controverted by the Applicant. It is trite that execution on its own does not amount to substantial loss because it is a lawful process. See the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* [2012] eKLR. The Respondents averred that the allegation of eminent eviction is not true because the occupants in possession of the suit land have offered to purchase their respective plots and the Respondents have accepted the proposals as demonstrated by the bundle marked SMM-01. Indeed, the annexures demonstrate that the Judgment is partially executed by the Respondents in line with the assailed Judgment.

14. That in the event the Applicants intended appeal succeeds, the suit land will be available for the Applicant to take possession. In my view the Applicant has not demonstrated the substantial loss she stands to suffer if the order of stay is not granted.

15. On whether the application was timeously filed, I note that the application was filed on 25/6/2024, barely a month after the delivery of the impugned Judgement. Clearly it was filed timeously. Lastly the Applicant deposed that she is ready and willing to abide by terms of security if so ordered by the Court.

16. Having failed to establish the substantial loss that the Applicant is likely to suffer, I am of the considered view that the application is unmerited.

17. The application is hereby dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.



18. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Karanja for the Plaintiff

Ms. Kerio for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Court Assistant – Phyllis

