**Kimani (Suing as the administrator of the Estate of the Late John Kimani Gaitho) v Muhia & 2 others (Environment and Land Appeal E009 of 2024) [2024] KEELC 13212 (KLR) (Family) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13212 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA**

**FAMILY**

**ENVIRONMENT AND LAND APPEAL E009 OF 2024**

**MC OUNDO, J**

**NOVEMBER 14, 2024**

**BETWEEN**

**PETER KAROKI KIMANI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE JOHN KIMANI GAITHO) ........................... APPELLANT**

**AND**

**JAMES WANGUI MUHIA ........................................................... 1ST RESPONDENT**

**NAIVASHA LAND REGISTRAR ............................................... 2ND RESPONDENT**

**ATTORNEY GENERAL ............................................................... 3RD RESPONDENT**

**RULING**

1. Vide a Notice of Motion Application dated 12th August, 2024 brought under the provisions of order 1A, 1B and 3A (sic) of the *Civil Procedure Act*, Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Rules 3 (1) and (2) of the High Court Practice and Procedure Rules of the *Judicature Act* Cap 8 of Laws of Kenya and all other enabling provisions of law, the Appellant/Applicant has sought for orders of stay of execution of the judgment in Naivasha MCELC No. E018 of 2021 and any consequential orders pending the hearing and determination of the Appeal, as well as for costs of the Application to abide by the Appeal.

2. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by Peter Karori Kimani, the Appellant/Applicant herein who deponed that he had instituted a suit against the Respondents in Naivasha law court vide MCELC No. 18 of 2021 which suit had been heard and determined on 8th August, 2024, wherein it had been dismissed in its entirety. That the said judgement had been delivered in the absence of his advocate hence he was not in a position to apply for stay of execution.

3. That he was aggrieved by the said judgement which he had appealed against. That however, he was apprehensive that the Respondents would commence execution of the said judgment were the orders of stay pending the hearing of his appeal not granted.

4. That he stood to suffer substantial loss as the Respondents were likely to transfer the subject property to other parties, there being already parties who had commenced construction of houses despite the status quo orders having been issued in the lower court.

5. He deponed that he had an arguable appeal with high chances of success and that no prejudice would be occasioned against the Respondent were the Application allowed. That subsequently, the court should exercise its discretion in his favour and allow the instant Application in the interest of justice.

6. In response and in opposition to the Appellant/Applicant's Application, the 1st Respondent filed a Replying Affidavit dated 3rd September, 2024 sworn by herself wherein she deponed that the intended Appeal was not arguable in view of the evidence on record. That there was no real danger of the subject matter herein being interfered with pending determination of the preferred Appeal.

7. She thus deponed that the Application lacked merit, was an abuse of the court process hence should be dismissed with costs and the Appeal be summarily dismissed.

8. The 2nd and 3rd Respondents did not participate in the instant Application

9. Pursuant to directions taken for the disposal of the application through written submissions, the Applicant, while placing reliance on the prayers sought in the Notice of Motion Application, the provisions of Order 42 Rule 6 of the Civil Procedure Rules and the decided case of Nicolus Stephen Okaka & another v Alfred Waga Wesonga [2022] eKLR submitted that he had met the threshold required in granting stay orders hence the instant Application should be allowed.

10. The 1st Respondent's submissions in opposition of the Notice of Motion Application dated 12th August 2024 was that whereas courts had discretion in determining an application of this nature, the exercise was fettered by three conditions being sufficient cause, that substantial loss that would ensue from a refusal to grant stay, an Applicant must furnish security and lastly that the stay must be sought without unreasonable delay.

11. Her submission was that the judgement in this matter having been pronounced on 8th August, 2024 wherein the said date had been fixed by court in presence of the parties, the Appellant's Advocates had chosen not to attend court, that the instant appeal had been lodged out of time without leave of court hence there was no arguable Appeal before court. That further, the Applicant's claim being for a parcel of land on which the 1st Respondent was residing and held title in her name, there was absolutely nothing to execute on the 1st Respondent's part. That courts orders were not issued in vain. That however, in the unlikely event that stay would be granted, the Applicant should furnish security.

**Determination**

12. I have considered the Applicant's application, its opposition, the submissions by parties, the law as well as the authorities therein cited. I find that the only issue for determination is whether the Applicant has met the prerequisite for grant of stay of execution pending appeal.

13. Indeed, it is trite law that an appeal does not operate as an automatic stay of execution. Order 42 Rule 6 of the Civil Procedure Rules provides as follows;

    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 orders set aside. Prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is a case which, on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

2. No order for stay of execution shall be made under sub rule 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."

14. Subsequently, under the said provisions of law, an Applicant needs to satisfy the court that:

    i. Substantial loss may result to him/her unless the order is made;

    ii. That the application has been made without unreasonable delay; and

    iii. That the Applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him/her.

15. The Applicant has stated that he stood to suffer substantial loss as the Respondent may transfer the subject property to other third parties. However, the Applicant ought to show how execution will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal which the Applicant herein had not done.

16. What amounts to a substantial loss was clearly explained by the High court case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR where the court had observed 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..."

17. I have perused through the impugned judgment dated 8th August 2024 and noted that the Appellant/Applicant's suit had been dismissed with costs for having failed to prove his claim on a balance of probabilities. This in essence was a negative order, incapable of execution hence cannot be stayed. It should be noted that an order of stay of execution seeks to delay the performance of a positive order, that is, either an order that has not been complied with or has partly been complied with. (see Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya) [2015] eKLR)

18. In the case of Milcah Jeruto vs Fina Bank Ltd [2013] eKLR the Court had held that an order for stay cannot be granted where a negative order had been issued.

19. Under Section 2 of the *Civil Procedure Act*, the definition of a decree holder alludes to an order that was capable of being executed. It defines a decree holder as:

   'any person in whose favour a decree has been passed or an order capable of execution has been made…"

20. In the present judgment, the Court did not order the Applicants to do anything or to abstain from doing anything or to pay any sum of money.

21. Indeed, in the case of Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR the Court of Appeal when compounded with an application for stay of a negative order had held as follows: -

> " The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only."

22. Accordingly, the judgment of the trial court having been negative in nature, I find that there had been no orders flowing from the said judgement in respect of which a stay order could validly be granted. The Appellant/Applicant's Application dated 12th August, 2024 lacks merit and the same is hereby dismissed with costs to the 1st Respondent.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 14TH DAY OF NOVEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**