



**Ireri & 2 others v M’Mugambi (Environment and Land Appeal
E046 of 2024) [2024] KEELC 14013 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 14013 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E046 OF 2024
CK YANO, J
DECEMBER 19, 2024**

BETWEEN

LINA RWAMBA IRERI 1ST APPELLANT

IDAH FLORA IRERI 2ND APPELLANT

PETER MWARANANJAU IRERI 3RD APPELLANT

AND

JASPER GITONGA M’MUGAMBI RESPONDENT

RULING

1. The appellants/applicants approached the court vide the notice of motion application dated 3rd July, 2024 seeking the following orders-;
 1. Spent
 2. Spent
 3. That this Honourable court be pleased to issue an order for stay of execution of the ruling/order delivered on 12th June 2024 in Meru C.M ELC No. E149 of 2023 (Lina Rwamba Ireri & 2 others Vs Jasper Gitonga M’Mugambi) pending the hearing of the appeal.
 4. That costs of this application be borne by the respondent.
2. The application is brought under Sections 1A, 1B, 3A and 63 (e) of the *Civil Procedure Act*, Order 22 rule 22 and 42 rule 6 of the Civil Procedure Rules, Articles 50 and 159 (2) (a) (d) and (e) of *the Constitution* 2010 and all other enabling provisions of the law. The motion is premised on the grounds on its face and supported by the affidavit of Idah Flora Murugi Ireri dated 3rd July, 2024 and a further affidavit dated 15th October, 2024.



3. The applicants aver that they are siblings and that their mother, ALUISIA KANINI KAGUNDU KIMANI (now deceased) and who died in the year 2023 had a relationship with the respondent herein though they did not cohabit together as husband and wife. That initially, the suit parcel of land Nyaki/ Kithoka/3293 belonged to the applicant's deceased mother whereof she had built a house and they all settled thereon. A copy of the title deed marked "DFMI 01" has been annexed. The applicants aver that they have been in occupation of the suit property until the demise of their mother in the year 2023 and continue to occupy to-date. A bundle of photographs of developments on the suit property marked "DFMI – 02" have been annexed.
4. The applicants aver that sometime in the year 2017, their deceased mother introduced the respondent to them as a friend who would visit them occasionally but never lived with them. That when their mother was diagnosed with cancer, she on her own volition and without coercion transferred the suit property to the applicants herein. That soon after the death of the applicant's mother in the year 2023, the respondent started threatening to evict the applicants from the suit property which the applicants refer to as their only home. That on several occasions, the respondent used police officers at Runogone Police Post to intimidate the applicants and forcefully evict them from their late mother's dwelling house alleging that the suit property forms part of their matrimonial property, a claim the applicants deny. That the threats from the respondent prompted the applicants to institute the suit at the subordinate court.
5. The applicants state that they sought for an interlocutory injunction to restrain the respondent from evicting them from the suit property pending the hearing and determination of the main suit, and after the trial court granted the applicants an order for status quo, the respondent took all his personal belongings and vacated the house and moved to his own house situate on an adjacent parcel of land No. Nyaki/Kithoka/3296.
6. The applicants aver that the respondent filed a parallel application dated 17th April, 2024 wherein he sought inter alia, for injunction against the applicants from accessing the suit property and the dwelling house and an order for the applicants forceful eviction from the suit property with the assistance of the OCS Meru Police station pending the hearing of the main suit. The applicants state that surprisingly, the subordinate court proceeded to issue an eviction order against them at the preliminary stage. A copy of the ruling marked "DMFI -03" has been annexed.
7. The applicants aver that they had tendered enough evidence to show that the respondent does not reside on the suit property, but lives on an adjacent parcel of land No. Nyaki/Kithoka/3296. A copy of the search certificate for that land marked "DFMI – 04" has been annexed.
8. It is the applicants' contention that the eviction orders issued by the subordinate court is irregular and oppressive since they are the ones in possession and occupation of the suit land No. Nyaki/ Kithoka/3293 where they lived with their deceased mother until her demise in the year 2023. That the respondent has never lived on the suit property, but only used to visit the applicants' late mother occasionally. That the applicants' mother is buried on the suit land. Photographs of the grave site marked "DMFI – 05" have been annexed.
9. Relying on advice from their advocate on record, the applicants believe that an eviction order cannot be issued at the preliminary stage and more so when the applicants are the registered owners of the suit property and are in total occupation thereof. The applicants state that the respondent has already served the order upon the OCS Giaki Police station to provide security during the eviction exercise. A copy of a letter dated 18th June, 2024 to authenticate the court order has been annexed and marked "DFMI – 06". The applicants aver that if orders of stay are not granted, they and their children will be evicted and rendered destitute and landless and shall suffer great prejudice, loss and damage. That



- the execution will cause irreparable loss and damage and the application will be rendered nugatory and academic should the applicants be successful in the appeal.
10. The applicants' further contend that their right to fair trial in judicial proceedings will not be achieved as provided for under Article 50(1) of *the Constitution* of Kenya, 2010 if the intended execution is allowed to proceed. The applicants further contend that the application has been brought without unreasonable delay and that no prejudice will be suffered by the respondent since he has never been in possession of the suit property. That this court has discretionary powers to issue an order of stay of execution sought herein in exercise of its appellate jurisdiction, adding that it is in the interests of justice that the orders sought be granted.
 11. The applicants inter alia want the replying affidavit by the respondent struck out for having been filed outside the time granted by the court and without further leave. The applicants aver that security is available in form of the suit land. They denied being pathological liars as alleged by the respondent.
 12. In opposing the application, the respondent filed a replying affidavit dated 10th July, 2024 wherein he deponed inter alia, that the applicants are pathological liars. He annexed a copy of the 2nd applicant's statement dated 21st December, 2023 filed in Meru CM ELC No. 149 of 2023, an application dated 23rd December, 2023, further affidavit dated 15th May, 2024 together with the annexures thereto all filed in the said case and marked "JGM 1", "JGM 2" and "JGM 3" respectively.
 13. The respondent averred that he bought and developed the suit property jointly with his late wife who was the applicants' mother. He also accused the applicants of removing his household items from the house he stated they constructed together and which he said was their matrimonial home. The respondent averred that the applicants on their own volition moved out of the said residence when they realized that their title deed was fraught with fraud. A copy of O.B Report marked "JGM 4" has been annexed. The respondent accused the applicants of coming to court with dirty hands and for failing to adduce the requisite transfer documents that led to the issuance of the title deed in their names which the respondent termed as riddled with fraud.
 14. The respondent averred that he resided in their matrimonial property even after the demise of his late wife until the applicants forcefully evicted him from the subject matter, and that he reported the matter to the police. The respondent denied that police officers from Runogone Police post has been used to intimidate the applicants as alleged by the applicants. The respondent stated that the applicants filed suit in the lower court after acquiring the title deed in question fraudulently. He further stated that the applicants kicked him out but they moved out later from the suit premises and carted away everything, but stationed goons to bar the respondent from accessing the same. The respondent denied residing on LR No. Nyaki/Kithoka/3296 which he stated he had erected rental premises which are fully occupied.
 15. The respondent stated that he filed an application which was responded to by the applicants and which was decided in his favour, hence the filing of the appeal herein by the applicants. That the applicants are married and resided with their respective husbands until their illegal occupation of the suit premises after they forcibly evicted the respondent therefrom upon the demise of the deceased. The respondent stated that he reported the matter at Runogone Police Post vide Ob report which is annexed and marked "JGM 5". While contesting the allegation that he was a stranger to the deceased, the respondent annexed copies of facebook post by the 1st applicant and authorization documents for travel and medical visas marked "JGM 6" and "JGM 7" respectively.
 16. The respondent challenged the applicants how the title for the suit property was transferred to them and without a spousal consent. He annexed a copy of a marriage certificate marked "JGM 8". The respondent averred that he jointly purchased the suit property with his late wife from one Zaberio



Gitonga Naman but had it registered in her name solely since the respondent was working in Turkana with the Red Cross Society where he was in-charge of relief for Turkana and West Pokot counties. A copy of the land register marked “JGM 9” has been annexed. The respondent also gave details in relation to the applicants’ studies, marriage and employment to demonstrate his knowledge to the applicants and even questioned a birth certificate for one Maurice Mwenda Gitonga copies of which were annexed and marked “JGM 11 a & b”. He stated that he used to pay school fees for the said Maurice Mwenda.

17. The respondent wants the court to issue an order directing the directorate of Criminal Investigations to investigate and ascertain how the title deed in question was transferred without following laid down procedures. That the birth certificate in relation to Maurice Mwenda should also be investigated since it is a forgery. The respondent questioned why he was allowed to bury the deceased on the suit land and not on LR No. N.Tharaka/Rukurini/1530 which the applicants confirm the respondent jointly owned with the deceased. He stated that during their marriage with the deceased, from the year 2005, they acquired various properties jointly. The respondent urged the court to dismiss the application with costs and uphold the lower court ruling.
18. The application was canvassed by way of written submissions. I have read and considered the submissions filed and I need not reproduce the same in this ruling.
19. I have considered the application, the affidavits in support and against as well as the submissions filed and the authorities relied on. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the Civil Procedure Rules which provides as follows-;
 - “6(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 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 sub-rule (1) unless –
 - (a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that such application has been made without undue delay;
 - (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.
20. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law, not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant. The application must also be brought without undue delay and the court must satisfy itself that substantial loss may result to the applicant unless stay of execution is granted, and further 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.



21. From the record, the ruling appealed against was delivered on 12th June, 2024 while the application herein was filed on 4th July, 2024. This was after about 21 days. In my view, the application was filed timeously.
22. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the applicants, the applicants stated that they are in danger of being evicted from the suit premises wherein they are in occupation. The suit land is registered in the names of the applicants jointly with their late mother, Aluisia Kanini Kagundu Kimani. Of course, the respondent is of the view that the applicants fraudulently and illegally obtained the title deed to the suit land in their names.
23. In the case of Kenya Shell Limited Vs Benjamin Karuga Kigubu & Ruth Wairimu (1982- 1988) KAR 108, the Court of Appeal stated as follows;

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure rules can be substantiated. If there is no evidence of substantial loss to the applicants, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
24. In the case of Absalom Dora Vs Turbo Transporters [2013] eKLR, it was stated that-

“The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court. As such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospect that the appeal will not be rendered nugatory, and the decree – holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination”.
25. The Court of Appeal in the case of Butt Vs Rent Restrictions Tribunal (1982) KLR 417 while considering an application for stay of execution pending appeal stated inter alia that “the power of the court to grant or refuse an application for a stay of execution is a discretionary power. That the discretion should be exercised in such a way as not to prevent an appeal”. The court of appeal further held that “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”.

That “a judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings...”
26. In this case, it is not in dispute that in the ruling appealed against, the trial court issued an order for the eviction of the applicants herein from the suit premises domiciled in L.R NO. Nyaki/Kithoka/3293 pending the hearing and determination of the main suit. It is clear therefore that the order of eviction was issued at an interlocutory stage. Further, by issuing the order of eviction, that was an admission that the applicants are the ones in possession and occupation of the suit premises. The appeal herein is challenging the issuance of eviction orders at the interlocutory stage.
27. From the material on record, I am satisfied that unless the orders sought herein are granted, the applicants, may be evicted. This, no doubt, will render the appeal nugatory and may result in substantial loss. The suit property is registered in the applicants’ names. Their registration in my view can only be determined during the full trial. I also do not think that an order for security for costs is necessary in the circumstances of this case.



28. The upshot is that I find the notice of motion dated 3rd July, 2024 has merit and the same is allowed in terms of prayer 3 thereof. Costs of the application shall abide the outcome of the appeal and shall follow the event.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024.

In the presence of

Court Assistant – Tupet

Nyaga holding brief for Kiautha Arithi for appellants/applicants

Munene Kiriimi for respondent.

C.K YANO

JUDGE

