



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muchungo v Gitau; Bensure Auctioneers (Interested Party) (Environment & Land  
Case 48 of 2020) [2024] KEELC 13790 (KLR) (13 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13790 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 48 OF 2020**

**JG KEMEI, J**

**DECEMBER 13, 2024**

**BETWEEN**

**NGENDO WAINAINA MUCHUNGO ..... APPELLANT**

**AND**

**JAMES THENDU GITAU ..... RESPONDENT**

**AND**

**BENSURE AUCTIONEERS ..... INTERESTED PARTY**

**RULING**

1. Before Court is the Respondent/Applicant's Application dated 16/11/2023 seeking in the main stay of execution of Judgment delivered herein on 13/10/2022, the Ruling dated 18/9/2023 and consequent Amended Decree issued on 14/11/2023 pending the hearing and determination of his appeal. The Applicant also prays for costs of the Application. The Application is premised on grounds on its face that upon allowing the appeal before this Court, an Amended Decree was issued on 14/11/2023 which the Interested Party is misusing to evict the Applicant yet the appellate Court did not issue any eviction orders to that end. That unless the Interested Party is restrained, the Applicant stands to suffer great prejudice and further the Applicant is awaiting typed proceedings to file the Record of Appeal in the Court of Appeal.
2. The Application is supported by the Supporting Affidavit of even date of James Thendu Gitau, the Applicant. He averred that he is the sole proprietor of land known as Ruiru/Kiu/Block 2 Githunguri 3997 (the suit land). That on 15/11/2023 the Interested Party affixed a notice (annexure 3) on the suit land premises whose import amounts to a threat to eviction should the Applicant fail to vacate the suit land within 15 days. He avowed that he is informed by his Advocates that the Hon Court did not issue any eviction or demolition orders hence the Application.



3. Opposing the Application, the Appellant/Respondent Ngendo Wainaina Muchungo swore her Replying Affidavit on 5/12/2023. Denying the Applicant's claim of ownership of the suit land, she deponed that the Application is overtaken by events since the Land Registrar issued her with a new title deed (NWM-01) in line with the Judgment. That the Amended Decree directed the Applicant to give vacant possession of the suit land and as a consequence she instructed the Interested Party to enforce it on her behalf. That in the Company of her family she visited the suit land on 17<sup>th</sup> or 18<sup>th</sup> November 2023 and found it vacant, took possession and as such she is in lawful occupation of the suit land. That it was inevitable that the Respondent be evicted to give effect to the Orders of this Court and having failed to meet the threshold for stay of execution as envisaged under Order 42 Rule 6 of the Civil Procedure Rules, the Application is bereft of merit and ought to be dismissed with costs.
4. Directions were taken for parties to prosecute the Application by way of submissions.
5. The Applicant through the firm of Prof. Kiama Wangai & Co. Advocates filed submissions dated 12/6/24. Rehashing the background of the motion, the grounds in the motion and objection thereto, the Applicant maintained that whereas the Respondent may have obtained the title deed, the Applicant was still in occupation of the suit land and urged the Court to grant the orders sought.
6. In rebuttal the Respondent filed submissions dated 17/6/2024 through the firm of Bryan Khaemba, Kamau Kamau & Co. Advocates. Two issues were drawn for determination, whether the Applicant has satisfied the threshold to grant the order sought and whether the orders sought have been overtaken by events. It was posited that the Applicant bears the burden to establish the substantial loss he stands to suffer by way of cogent evidence which he has not discharged. That the instant Application has been filed inordinately late noting that the impugned Judgment and Decree was rendered on 13/10/2022 and the Applicant has not explained the delay.
7. On the second issue the Respondent was emphatic that in her Replying Affidavit she has demonstrated that the Application is overtaken by events on the basis of her title deed over the suit land. That her averments remain uncontroverted absent any Further Affidavit. In support of this proposition reliance was placed on the case of Otieno Bob Kephass Vs. Homabay County Assembly Service Board & Anor. [2020] eKLR.
8. The sole issue for determination is whether the Application is merited.
9. Concerning the prayer for stay of execution, 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.”

10. The jurisdiction to grant stay 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.”

11. Has the Applicant satisfied the conditions set in Order 42 rule 6 (2) of the Civil Procedure Rules above? The Applicant contends that the Respondent through the Interested Party has threatened to evict him from the suit land using an Amended Decree dated 14/11/2023. That the Judgment of this Court did not issue an eviction order which is reflected in the impugned Decree. The Applicant contended that he is in occupation of the suit land a fact vehemently opposed by the Respondent. Indeed, the Respondent swore that she is in lawful possession and occupation and now the registered owner of the suit land vide a title deed issued in her favor on 25/10/2023.

12. That said, 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 where the Hon Court held;

“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 Civil Procedure Rules. 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.”

13. The same position was adopted by Kimaru, J (as he then was) in Century Oil Trading Company Ltd Vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007 where he stated that:

“The word “substantial” cannot mean the ordinary loss to which every Judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money Decree is sought to be stayed, in considering whether the Applicant will suffer substantial loss, the financial position of the Applicant and that of the respondent becomes an issue. The Court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the Applicant is successful in his appeal. The Court has to balance the interest of the Applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his Judgement.”

14. In my view the Applicant has not demonstrated the substantial loss he stands to suffer if the order of stay is not granted in light of the circumstances of this case. In the event that his appeal succeeds nothing would deter the Court from reverting the suit land to his name.
15. On whether the Application was timeously filed, I note that the impugned Decree was issued on 15/11/2023 and the Application on 16/11/2023 and in the circumstances it was timeously filed. The Applicant deponed that he was ready and willing to furnish security but having failed to demonstrate substantial loss that he stands to suffer, the Application fails.
16. In the end the Application is without merit and it is dismissed with costs to the Respondent.
17. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13<sup>TH</sup> DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Bulowa HB Khaemba for the Appellant

Respondent/Applicant - Absent

Bulowa for the Interested Party

Court Assistant – Phyllis

