



**Kangethe v Wambugu & 3 others (Environment & Land Case  
100 of 2019) [2024] KEELC 13718 (KLR) (10 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13718 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 100 OF 2019  
JG KEMEI, J  
DECEMBER 10, 2024**

**BETWEEN**

**GEORGE KIMANI KANGETHE ..... PLAINTIFF**

**AND**

**LUCY GATHONI WAMBUGU ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH LELO ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR KIAMBU COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**HON ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Applicant moved the Court vide the Notice of Motion dated the 11/4/2024 seeking the following Orders;
  - a. That the Honourable Court be and is hereby pleased to hear this Application ex-parte at first instance.
  - b. That the Honourable Court be and is hereby pleased to issue an interim Orders of injunction and/or stay against execution and/or further proceedings in respect of the whole or any of the Orders as reposed in the impugned Judgment dated and delivered on 21<sup>st</sup> March 2024 pending inter partes hearing and determination of the Application herewith.
  - c. That the Honourable Court be and is hereby pleased to schedule an expedited inter parte hearing for the Application herein.
  - d. That the Honourable Court be and is hereby pleased to issue an interim Order of injunction and/or stay against execution and/or further proceedings in respect of the whole or any of the



Orders as reposed in the impugned Judgment dated and delivered on 21<sup>st</sup> March 2024 pending inter partes hearing and determination of the Appeal.

- e. That the Honourable Court be and is hereby pleased to issue any further directions or orders as may be appropriate to give effect to the Orders sought herein; and
  - f. That the costs of this Application be provided for.
2. The Application is premised on the grounds annexed thereto and the Supporting Affidavit of Joseph Lelo the Applicant herein who deposed that Judgment was delivered in this suit on the 21/3/24 in favour of the Plaintiff/Respondent. That being displeased with the said decision, he has filed an appeal at the Court of Appeal which appeal is meritorious arguable with overwhelming chances of success as exhibited in the draft Memorandum of Appeal annexed thereto.
  3. He added that following the delivery of the Judgment, he risks being evicted from the suit land in addition to attachment of his assets to record the award of damages in the sum of Kshs. 1 Million. That unless orders of stay of execution are granted, the Plaintiff shall proceed to enforce the said Judgment. That his appeal would be rendered nugatory and that he stands the risk of eviction before he is heard on his appeal not to mention the greater risk of the suit property being transferred to third parties out of the reach of the Court. He maintains that if the orders are granted the Respondent will not be prejudiced since if the Judgment is affirmed in his favour, he will take possession of the suit land. That it is in the interest of justice that status quo be maintained pending the hearing and determination of the appeal. Lastly that the Application has been filed timeously and added that he is ready and willing to abide by any orders of security as may be directed by the Court.
  4. In a quick rejoinder the Plaintiff/Respondent opposed the Application vide his Replying Affidavit sworn on the 23/4/2024 where he deposed that the 2<sup>nd</sup> Defendant has never been the registered owner of the suit property and therefore has no legitimate grounds to claim title and or remain in possession of the suit land. That the Judgment of the Court was premised on the unchallenged and proven fraud on the part of the 1<sup>st</sup> Defendant who chose not to challenge the Judgment of the Court and in the circumstances the Applicant cannot have a better title than the 1<sup>st</sup> Defendant. That the Applicant has not demonstrated substantial loss that he stands to suffer if the orders of stay of execution are not granted and that conversely it is the Plaintiff who stands to suffer loss and prejudice through the deprivation of the suit land through fraudulent dealings. Lastly he averred that the 2<sup>nd</sup> defendant ought to deposit the damages ordered by the Court in a joint interest earning account as a condition for stay.
  5. I have read and considered the submissions of the parties.
  6. The key issue is whether the Application is merited.
  7. The provisions for stay of execution pending appeal are founded 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.”

8. 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.”

9. It is trite that the purpose of an Application for stay of execution pending appeal is to preserve the subject matter of the suit in dispute so that the rights of the Appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory.

10. The Court is therefore called upon to weigh the right against the successful litigant who should not be deprived of the fruits of the Judgement and ensure that no party suffers prejudice that cannot be compensated by an award of costs. See the case of *RWW Vs. EKW* (2019) eKLR.

11. In this case the Court finds that the Application has been filed timeously. In the view of the Court, the interests of the contestants in this dispute will be considered and balanced by way of stay of execution so as not to render the appeal nugatory. On the other hand and by way of balancing the scales of justice, the Applicant is ordered to deposit security in the sum of Two Hundred Thousand Shillings Only (Kshs 200,000/-) in Court for the due performance of the decree as the parties await the outcome of the appeal



12. Costs shall be in favour of the Plaintiff only noting that the 1<sup>st</sup> and the 3<sup>rd</sup> Defendants did not oppose the Application.
13. Final orders for disposal;
  - a. The Application is allowed on terms;
  - b. The Applicant is ordered to deposit the sum of Two Hundred Thousand Shillings Only (KShs 200,000/-) in a joint interest earning account in the names of the Counsels representing the 2<sup>nd</sup> Defendant and the Plaintiff within the next 60 days in default the orders shall lapse automatically.
  - c. Costs are in favour of the Plaintiff.
14. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 10<sup>TH</sup> DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Ms. Kagoni HB Macharia for the Plaintiff

1<sup>st</sup> Defendant – Absent

Jane Okoth – 2<sup>nd</sup> Defendant

3<sup>rd</sup> and 4<sup>th</sup> Defendant – Absent

Court Assistant – Phyllis

