



Mwangi (Suing as a Legal Representative of the Estate of Mwangi Kabaiku (Deceased)) v Kimiti & another (Environment & Land Case 283 of 2017) [2024] KEELC 13707 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13707 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 283 OF 2017**

**JG KEMEI, J
DECEMBER 9, 2024**

BETWEEN

**RACHAEL NJANGO MWANGI PLAINTIFF
SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF MWANGI
KABAIKU (DECEASED)**

AND

**HANNAH WANJIRU KIMITI 1ST DEFENDANT
JOHN NJENGA WANJIRU 2ND DEFENDANT**

RULING

1. The application dated the 15/5/2024 was filed by the Applicants/Defendants seeking orders for stay of execution of the decree of this Hon. Court issued on the 25/4/2024 pending the hearing and determination of the appeal.
2. The application is premised on the grounds annexed thereto and the Supporting Affidavit of the 2nd Applicant deponed on even date and where he averred that they are dissatisfied with the Judgment of the Court delivered on the 25/4/2024 for which they have proffered an appeal. That unless the orders are granted herein their appeal shall be rendered nugatory.
3. The Respondent resisted the application through the Replying Affidavit deponed on the 28/5/2024 and termed the application baseless, misplaced in law and vexatious and a gross abuse of the Courts process. That it falls short of the requirements necessary to issue stay of execution orders as the claim of execution of the decree being a lawful process is not enough to warrant issuance of the orders. That the Applicants have not established substantial loss and that absent the draft memorandum of appeal the Court is unable to evaluate the arguability of the appeal. That the interest of justice weighs against granting the application.



4. Parties filed written submissions which I have read and considered in the Ruling.
5. The key issue for determination is whether the application is merited and who meets the costs thereof.
6. 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.”

7. 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.”



8. The Applicant has argued that the Respondent has issued notice for the eviction of the Respondents pursuant to the Judgement of the Court and unless stayed they stand to be evicted before their appeal is heard thus the same being rendered nugatory. Admittedly the process of execution has begun. It is the principle of law that execution in itself is a lawful process and even where execution has been commenced and concluded the same cannot be the appropriate test to establish substantial loss. Substantial loss has been defined in the case of James Wangalwa & Another Vs. Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR) where the Court stated as follows;

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above”

9. It is trite that despite the above, Courts are enjoined to give effect to the overriding objectives of the Court in exercise of its powers under the *Civil Procedure Act* and in my view the threat of eviction in this case is real and unless stay orders are granted the appeal will be rendered an academic exercise.
10. The Judgment of the Court was delivered on the 25/4/2024 and this application was made on the 15/5/2024 therefore timeously.
11. To serve the interest of justice I order the Applicants to deposit the sum of Kshs 100,000/- in Court for the due performance of such decree or order as may be ultimately be binding on them within the next sixty (60) days in default the orders of stay granted herein shall stand dismissed.
12. The costs of the application shall be met by the Applicants.
13. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 9TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Waichinga HB Mrs. Mukira for the Plaintiff

Njuguna for 1st and 2nd Defendants

Court Assistants – Phyllis

