



**Lempaka & another v Gathigi (Environment and Land Appeal
E005 of 2021) [2023] KEELC 254 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E005 OF 2021
CG MBOGO, J
JANUARY 26, 2023**

BETWEEN

SAMANTE LEMPAKA 1ST APPELLANT

BENJAMIN NENJORE SINGILA 2ND APPELLANT

AND

NJUGUNA KABUE GATHIGI RESPONDENT

RULING

1. Before this court for determination is a notice of motion application dated September 29, 2021 and filed in court on September 30, 2021 expressed to be brought under section 3A of the [Civil Procedure Act](#) and Order 12 rule 7 (sic) of the [Civil Procedure Rules](#) seeking the following orders: -
 1. Spent.
 2. That pending the hearing and determination of this application inter-partes, this honourable court be pleased to stay the execution or further execution of the judgment/decree herein.
 3. That there be a stay of execution herein pending the hearing of the appeal.
 4. That costs be in the cause.
 5. The application is premised on the grounds that the appellants being dissatisfied with the judgment delivered on May 26, 2021 in Narok CMCC ELC No 83 of 2019 has filed the appeal which has overwhelming chances of success.
 6. The application is supported by the affidavit of the 1st applicant sworn on even date and on behalf of the 2nd applicant. The 1st applicant deposed that they believe that they have an arguable appeal with high chances of success and unless stay is granted, the appeal shall be rendered nugatory and they shall suffer irreparable damage.



7. The appellant filed written submissions dated October 18, 2022. The submissions by the appellants were on the main appeal as opposed to stay of execution of judgment. Therefore, I will not consider the written submissions at this stage.
8. The respondent did not file written submissions. Be that as it may, I have analysed the pleadings and the issue for determination is whether the applicants are entitled to stay of execution pending hearing and determination of the appeal.
9. The principles upon which the court assesses such an application are laid down in Order 42 rule 6 of the *Civil Procedure Rules* which provides as follows: -
 - “(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. It will be seen that the above provisions are couched in mandatory terms and three conditions must thus be satisfied before an applicant succeeds on an application for stay pending appeal. First, the court must be satisfied that substantial loss will be occasioned to the applicant unless the order of stay is made. Secondly, the application for stay pending appeal must be made without unreasonable delay; and finally, there must be security for the due performance of the decree.
11. I will begin with unreasonable delay. The applicant herein filed the instant application on September 29, 2021 and a memorandum of appeal dated June 10, 2021. The judgment in the trial court was delivered on May 26, 2021. The application for stay was made four months after delivery of the said judgment. I am of the view, that based on the orders issued pursuant to the judgment being orders of eviction, there was delay in filing the application and as such, the applicants have failed on this ground. On whether substantial loss will be occasioned in the event the orders sought are not granted, I have not seen any demonstration of substantial loss that the applicant stands to suffer. In fact, the applicant has not stated what this “irreparable damage” is going to be if stay is not granted. It is not for this court to speculate for the applicants what loss they stand to suffer. The *onus* is on the applicants to state what loss they stand to suffer and show how that loss is substantial.
12. On the third limb which is security for costs, the applicants have not deponed on this issue and in view of this, this court is in doubt whether the applicants are indeed aggrieved by the decision of the judgment of the trial court.
13. Arising from the above, this court finds no merit in the notice of motion application dated September 29, 2021 and the same is dismissed with no orders as to costs. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 26TH DAY OF JANUARY, 2023.

HON. MBOGO C.G.

JUDGE

26/1/2023.

In the presence of:



