



**Kinyua v Kaesha & another (Environment and Land Appeal  
E036 of 2022) [2023] KEELC 140 (KLR) (23 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 140 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E036 OF 2022  
MN GICHERU, J  
JANUARY 23, 2023**

**BETWEEN**

**AGATHA WAMBITI KINYUA ..... APPELLANT**

**AND**

**MARTIN KAMIA KAESHA ..... 1<sup>ST</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KAJIADO ..... 2<sup>ND</sup> RESPONDENT**

*(Kajiado Chief Magistrates Case No MCELC 14 of 2019)*

**RULING**

1. This ruling is on the notice of motion dated September 5, 2022. It seeks one main prayer namely- Stay of execution of the judgment dated July 15, 2022 in Kajiado Chief Magistrates Case No MCELC 14 of 2019 pending the hearing and determination of this appeal.
2. The application is supported by five grounds, an affidavit dated 5/9/2022 and a memorandum of appeal dated August 10, 2022. It is brought under sections 63(e), 1A, 3A of the *Civil Procedure Act*, order 40 rules 2, 3 and 4, order 51, rule 1 of the *Civil Procedure Rules*, sections 10 of the *Judicature Act*, rule 3 of the *High Court (Practice and Procedure) Rules*, rule 17 of the *High Court (Organization and Administration)*, section 13 of the *Environment and Land Act* 2011 and all enabling provisions of law.
3. The gist of the above material is that the lower court dismissed the appellant's suit without good reason. She therefore filed this appeal which has high chances of success. If the current application is not allowed, the appeal will be rendered nugatory and the applicant will be evicted from the Suit Plot No 530/Business-Noonkopir T Centre/New No B7.
4. The motion is opposed by the respondent who has sworn a replying affidavit dated 3/10/2022 in which he states as follows.



Firstly, the appellant did not produce any evidence of ownership before the trial court. In contrast, the respondent was able to prove that she bought it from a person who was allocated the land in 1995.

Secondly, the appellant is not in occupation because the land is vacant. She cannot therefore claim to be likely to suffer irreparable loss.

Finally, the application has been brought under the wrong provision of law which deals with injunctions and not the one dealing with appeals.

Counsel for the parties were expected to have filed and served written submissions by December 13, 2022 but by the time I am writing this ruling in late December, no such submissions have been filed.

5. I have carefully considered the application in its entirety including the affidavits, grounds, annexures and the applicable law. I make the following findings.

Firstly, I find that it is trite law that pursuant to article 159(2) (d) of the *Constitution* and order 2 rule 14 *Civil Procedure Rules*, the court is required to administer substantial justice without undue regard to technicalities and form.

While I agree with the respondent that the order under which the current application is brought deals with injunctions and not appeals, I find that this is not fatal to the application.

Secondly, what I find fatal to the application is that the applicant has not been able to prove that she will suffer substantial loss if the application is not allowed. She has not been able to prove that she is in occupation of the suit land.

Order 42, rule 6 (2) (a) *Civil Procedure Rules* provides as follows.

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...”

There are other conditions precedent to the grant of an order of stay of execution pending appeal but the one above is the first one.

I find that since the applicant is not in occupation of the suit land, there is no proof that she will suffer substantial loss.

On that ground alone, I find no merit on the notice of motion dated 5/9/2022 and I dismiss it. Costs in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN KAJIADO THIS 23RD DAY OF JANUARY, 2023.**

**M.N. GICHERU**

**JUDGE**

