



REPUBLIC OF KENYA



KENYA LAW
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**Wambui v Wakaba & 3 others (Civil Appeal E057 of 2024)
[2025] KEHC 6374 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 6374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E057 OF 2024
DO CHEPKWONY, J
JANUARY 30, 2025**

BETWEEN

SAMUEL MBIRIRI WAMBUI APPELLANT

AND

KEZIAH NYAMBURA WAKABA 1ST RESPONDENT

DANIEL KANGANGI WAMBUI 2ND RESPONDENT

MARGARET WANGARI WAMBUI 3RD RESPONDENT

SIMON KURIA WAKABA 4TH RESPONDENT

RULING

1. Before this court is the Notice of Motion application dated 25th April, 2024 filed under Certificate of Urgency seeking the following orders:-
 - a. Spent.
 - b. Spent.
 - c. That this Honourable Court be pleased to grant an order of stay of executing pending appeal on the judgment delivered on the 21st March 2024 by Hon. Peter Muholi PM pending the hearing and determination of this appeal.
 - d. Spent.
 - e. That this Honourable Court be pleased to make orders that are expedient in the circumstances of this case.
 - f. That the costs of the application be provided for.



2. The Application is premised on the grounds as set out on its face and the Supporting Affidavit of Samuel Mbiriri Wambui sworn on the instant date. It is the Applicant's case that the trial court delivered judgment in favour of the Respondents in respect of Parcel No. Gitambaya Plot 2636 measuring 50ft by 100ft in which he has been in occupation of for over thirty (30) years. Aggrieved by this decision, the Applicant lodged the present appeal which has a high possibility of success so that if the Respondents are to proceed with execution he stands to suffer irreparable loss. According to the Applicant, the trial court ordered all the five beneficiaries of the Estate of Mary Wambui Wakaba to share the plot which is impractical as his children will be evicted and the appeal rendered nugatory. He contends that he is willing to abide by any terms the court will set as it will be in the interest of justice that the application is allowed.
3. The Application was opposed by the Replying Affidavit of Kezia Nyambura Wakaba sworn on 28th October, 2024, wherein she had deponed that she is the Administrator of the Estate of the Deceased which has already been distributed as per the Certificate of Confirmation of Grant lawfully issued on 3rd April, 2024. She avers that the Applicant cannot claim occupation of the subject plot without providing any evidence why he did not approach the court sooner. She holds that the trial court rightfully found the applicant to be an intermeddler on the subject plot and thus the application is only a waste of court's time, hence the same should be dismissed. She has however urged that if the court is inclined to grant the orders, then the court should direct that the rental income from the said plot be deposited in a joint account or joint agent employed on behalf of all beneficiaries.

Analysis and Determination

4. I have read through the grounds set out in the affidavits filed by the parties herein in support and against the prayer being sought and find the issue for determination being whether the Applicant has demonstrated sufficient grounds to warrant the order of stay of execution to be granted.
5. The law on stay of execution is enshrined under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides that:-

“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 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”
6. It is trite law that for a court to grant stay of execution three conditions must be met:-
 - a. The application has been made without unreasonable delay.
 - b. The Applicant will suffer Substantial loss
 - c. The Applicant has offered security for due performance of the decree.
7. With regard to the requirement that the application be made without reasonable delay, it is noted that the Judgment herein was delivered on 21st March, 2024 and the present application filed on 30th April, 2024. In this Court's view, this was quite timely hence this condition was fulfilled.
8. On the requirement that the Applicant demonstrates the substantial loss he is likely to suffer, the Applicant has stated that he has been in occupation of the subject land for more than thirty (30) years



and together with his family, they stand to be evicted from the said land and rendered homeless and destitute if the orders are not granted. The court in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR held that:-

“Substantial loss in its various forms is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money”

9. In this Court’s view, eviction from a property being it land or premises has serious ramifications, and more often than not invoke a number of rights recognised by the international Conventions on Human Rights hence the need to hear the parties and ensure the procedural protections are applied so as to guard against any abuse thereof.

10. Lastly, on the issue of security for the due performance, while the Applicant may not have offered any specific security, he has expressed the willingness to abide by any condition that the court may set out as security for the due performance. This issue of security for due performance of a decree was discussed in the case of *Gianfranco Manenthi & Another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where it was held that:-

“... the Applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails...”

11. Based on this Court’s findings on whether or not the Applicant has satisfied the requirements of Order 42 Rule 6 (2) of the *Civil Procedure Rules*, this Court finds that the Applicant has stated that he has been in occupation of the said parcel of land for over thirty (30) years and together with his children have built houses thereon, which if evicted, may be demolished. I have also read through the Memorandum of Appeal and find that the Applicant has raised an arguable appeal.

12. On the purpose of an application for stay of execution pending appeal the court in *RWW v EKW* [2019] eKLR, held:-

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”

13. From the foregoing, the court proceeds to grant the following orders:-

- a. The Notice of Motion application dated 25th April, 2024 be and is hereby allowed on condition that all the rental income collected from the subject land be deposited with a joint agent to be appointed by the parties herein within thirty (30) days from the date of this ruling.
- b. The Applicant/Appellant to file and serve a Record of Appeal within thirty (30) days from the date of this ruling.



- c. Mention on 8th May, 2025 for parties to confirm compliance of directions/orders issued herein failure to which the application shall stand dismissed with costs to the Respondent and order issued vacated forthwith.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 30TH DAY OF JANUARY , 2025.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. King'ang'i counsel for Respondent

Court Assistant - Martin

