



REPUBLIC OF KENYA



KENYA LAW
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**Nyangena v Wanjohi & 3 others (Environment & Land Case
253B of 2015) [2023] KEELC 15699 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15699 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 253B OF 2015
FM NJOROGE, J
FEBRUARY 23, 2023**

BETWEEN

JUDITH KWAMBOKA NYANGENA PLAINTIFF

AND

ISAAC NJUHIGU WANJOHI 1ST DEFENDANT

ZIPPORAH WANGARI WANJOHI 2ND DEFENDANT

SARAH MUTUA 3RD DEFENDANT

LAND REGISTRAR NAKURU COUNTY 4TH DEFENDANT

RULING

1. The plaintiff filed a Notice of Motion dated February 1, 2023 seeking the following orders:
 1. ...spent.
 2. That this Honourable Court be pleased to grant stay of execution of the judgment delivered on January 19, 2023 and Decree pending inter-partes hearing and determination of this application.
 3. That this Honourable Court be pleased to grant stay of execution of the Judgment delivered on January 19, 2023 and Decree pending the hearing and determination of intended appeal preferred there from.
 4. That the costs of this application be provided for.
2. The grounds upon which the application is premised are set out at the foot of the application and in the supporting affidavit dated February 1, 2023. The applicant states that she has lodged a notice of appeal and that the intended appeal would be rendered nugatory if the orders sought were not granted.



- She also claims that she stands to suffer substantial loss in the event the decree is executed before the appeal is heard.
3. The 1st -3rd respondents opposed the application vide the replying affidavit sworn on their behalf by the 3rd respondent. It is stated in that affidavit that the judgment of the court only confirmed that the 1st and 2nd respondents were at inception the owners of the suit land and had not parted with title to the suit land in sale to any of the parties who purported to own the land later including the applicant herein. Consequently, they aver that the application does not meet the threshold for the grant of the orders of stay of execution sought.
 4. In addition, they state that they are willing to undertake not to dispose of the property until the proposed appeal is heard and determined. However, they complain that no draft memorandum of appeal has been exhibited to demonstrate that the proposed appeal has any chances of success. They add that there were no developments erected on the suit land by the applicant and so she stands to lose nothing if the orders sought are not granted, and that the purchase price she had paid should have been sought from the fraudsters who purported to sell the suit land to her; also, the decree was a negative order incapable of being stayed and therefore the orders sought are not fitting in the circumstances. On the last point I must state that from a wholistic perspective, the plaint was tried contemporaneously with the counterclaim and therefore the grant of the orders sought in the counterclaim alongside the denial of the orders sought in the plaint in the same decree rendered the decree to be one having positive orders which could be stayed in fitting circumstances.
 5. This court is more focused on the argument by the respondents that the land was originally theirs and that the court only confirmed what had been the case before fraudsters swept in and profited from illegal sales of the defendants' land. I have also noted that the issue of why the purported sellers were not joined to the suit for the purposes of a counterclaim against them or a claim against a co-defendant has also arisen again in the response to the motion and, in my view, it is not a simple issue to be swept under the carpet; it goes to the very core of the appeal. I will make no further comments on the appeal at this stage since the court that will handle the appeal will rule on whether the same has any merits.
 6. What this court is concerned with is whether the order of stay of execution ought to be granted. Of course a successful party must be considered to have a right to enjoy the fruits of his judgment at the earliest unless there is any just cause to deprive him of that enjoyment. This court has noted that the notice of appeal has been filed and therefore for the purposes of an application of the sort before me there is an appeal in existence. The second consideration is whether the application was brought timeously. I think that the application having been filed by the applicant on February 2, 2023, about 14 days after the judgment that was delivered on January 19, 2023, was timely filed.
 7. I have considered the fact that rectification of the records would have to be effected by the Land Registrar in order to effect the decree and I think that in order to prevent the disposal of the suit property the order of stay should be granted.
 8. Consequently, I allow the notice of motion dated February 1, 2023 in terms of prayer No (3) thereof on condition that the applicant shall file and serve her record of appeal within 30 days of this order to prevent any delay in the resolution of this dispute under the aegis of filing an appeal, and in default the order of stay of execution granted herein shall stand automatically vacated. The costs of the said notice of motion application shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 23RD DAY OF FEBRUARY, 2023.

MWANGI NJOROGE



JUDGE, ELC, NAKURU

