



Mutithirimbi v Thimangu & another (Environment and Land Appeal E002 of 2022) [2023] KEELC 15745 (KLR) (22 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15745 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E002 OF 2022
CK NZILI, J
FEBRUARY 22, 2023**

BETWEEN

JULIUS MUTTITHIRIMBI ALIAS KARINGURI APPLICANT

AND

STANLEY THIMANGU 1ST RESPONDENT

JACOB MUGAMBI 2ND RESPONDENT

RULING

1. Through an application dated 22.4.2022, the court is asked to stay the execution of the trial court's judgment delivered on 21.4.2022 pending the hearing and determination of this appeal. The application is supported by an affidavit of Julius Mutithiribi alias Karinguri sworn on the even date, who stated that after the judgment and a ruling delivered on 21.4.2022, he was likely to be evicted from the suit land. Further, the applicant averred that if eviction occurred he shall suffer irreparable loss and damage. The application is not opposed by the respondent by way of a replying affidavit. Be that as it may both parties have filed written submissions dated 5.1.2023 and 16.1.2023 respectively.
2. The applicant submitted that he had met the conditions under order 42 Rule 6 of the *Civil Procedure Rules* given that he is the recorded owner of Plot No. 115 Kianjai market whereas the respondents have only had a provisional letter of ownership lacking the plot size. The applicant insists that his rights are protectable under section 26 (1) of the *Land Registration Act*. Reliance was placed on *Charles Kariuki Njiru vs Francis Kimaru Rwara* (2020) eKLR and *Consolidated Marine vs Nampijja & another NRB Civil Application No 93 of 1999*.
3. On the other hand, the respondents submitted that the applicant had not demonstrated any substantial loss to be suffered unless the order is granted and that in any event, it is them to suffer for there is a decree in force yet the applicant is trespassing onto their property.



4. The respondents submitted that any continued occupation will be prejudicial to them since they are being denied the enjoyment of the fruits of their judgment. On the issue of security, the respondent submitted that no offer to furnish the security has been made as held in *Ena Investment Ltd vs Benard Ochan Mose & 2 others* (2022) eKLR which cited with approval *Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates and 2 others* (2014) eKLR.
5. For a party to be entitled to stay of execution four key parameters under order 42 of the *Civil Procedure Rules* have to be met namely; filing the application timeously, demonstrating that there will be substantial loss and damage if stay orders are not granted; offering security for the due realization of the decree should the appeal not succeed and lastly, by demonstrating that it is in the interest of justice for the orders to be granted under sections 1A, 1B & 3A of the *Civil Procedure Act* as read together with article 159 of *the Constitution*.
6. The purpose of stay is to preserve the substratum of the appeal. This was the holding in *Consolidated Marine vs Nampijja* (supra). In this application, the burden is on the applicant to define the status of the subject matter and demonstrate what loss or damage he is likely to suffer if the subject matter is disturbed through the process of execution, which in law, is a lawful exercise as held in *James Wangalwa vs Agnes Cheseto* (2012) eKLR. In *Charles Wabome Gethi vs Angela Wairimu Gethi* (2008) eKLR, the court took the view that an applicant for stay must not just allege that he or she lives or resides on the suit land, but must go further and demonstrate the loss he was likely to suffer if execution were to proceed. Additionally, in *Machira t/a Machira & Co. Advocates vs East African Standard* (2002) eKLR, the court took the view that a successful party was entitled to the enjoyment of the fruits of his judgment and that court must guard the overriding objective of doing justice in accordance with the law so as to prevent an abuse of the court process.
7. In this application, the applicant should have done more than merely alleging that he was likely to suffer substantial loss and or irreparable damage. No tangible or cogent evidence has been presented on the nature, status, value and manner of the loss if the execution were to proceed, before the hearing and determination of the appeal.
8. It is trite law that in exercising the discretion on whether to grant stay or not, the court would do so balancing the interests of a successful party who is entitled to enjoy the fruits of judgment against the appellant who has an undoubted right of appeal. The court has to weigh on a scale the two competing rights. In so doing, it is the parties and particularly the applicant who must sway the court's discretion in his favor by showing other extenuating factors which militate against allowing an execution.
9. In this application, the respondents have averred that what the applicant relied upon in the trial court was an application for a market stall and not a plot. On the other hand, the applicant submitted before this court that what the respondents produced as evidence were inconclusive letters of ownership lacking the land size, which in his view required more ventilation by way of an appeal before he is evicted and or his structures demolished. Unfortunately, the applicant has not demonstrated that state of affairs by way of evidence on the value of his developments.
10. The court must also be guided by the interest of justice. Doing the best I can in the circumstances, I find that in the interest of justice that the status quo subsisting as at the ruling herein be maintained for a period of 6 months as the appeal is heard and determined. The applicant shall in the meantime deposit Kshs.100,000/= as security for costs within 14 days from the date hereof in default execution to issue. The lower court file be availed and the matter be mentioned before the Deputy Registrar on 23.3.2023.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 22ND DAY OF FEBRUARY, 2023



In presence of:

C/A: Kananu

Applicant

Nyenyire for appellant/applicant

Mrs. Otieno for respondents

HON. C.K. NZILI

ELC JUDGE

